Supreme Court of the United States

OCTOBER TERM, 1965

No. 656

BARBARA ELFBRANDT, PETITIONER

vs.

IMOGENE R. RUSSELL, ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARIZONA

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[fol. A]

IN THE SUPREME COURT OF THE STATE OF ARIZONA

No. 7406

BARBARA ELFBRANDT, for herself and others similarly situate, APPELLANTS

vs.

IMOGENE R. RUSSELL, L. E. BOOL and MARTHA L. ELLIOTT, ET AL., APPELLEES

ABSTRACT OF RECORD

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[fol. 1]

IN THE SUPERIOR COURT
OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF PIMA

No. 68,451

BARBARA ELFBRANDT, for herself and others similarly situate, PLAINTIFFS

vs.

IMOGENE R. RUSSELL, L. E. BOOL and MARTHA L. ELLIOTT, members of the Board of Trustees of Amphitheater Elementary School District No. 10, Pima County, State of Arizona;

PAUL J. FANNIN, Governor of the State of Arizona;

ROBERT W. PICKRELL, Attorney General of the State of Arizona;

JEWEL W. JORDAN, State Auditor;

LYNN M. LANEY, O. D. MILLER, SAMUEL H. MORRIS, JOHN G. BABBITT, ELWOOD W. BRADFORD, VIVIAN LAYTI BOYSEN, GEORGE W. CHAMBERS, and LEON LEVY, members of the Board of Regents;

and

W. W. DICK, State Superintendent of Public Instruction, and PAUL J. FANNIN, Governor, ex-officio members of the Board of Regents;

FLORENCE REECE, Pima County Superintendent of Schools;

ROBERT D. MORROW, Superintendent of Tucson School District #1;

[fol. 2]

JACOB C. FRUCHTHENDLER, DELBERT L. SECRIST, NAN LYONS, NORVAL W. JASPER and WILLIAM J. PISTOR, School Board, Tucson District #1;

and

RICHARD A. HARVILL, President of the University of Arizona, DEFENDANTS

COMPLAINT FOR DECLARATORY JUDGMENT
and
PETITION FOR TEMPORARY RESTRAINING ORDERS, ORDERS TO SHOW CAUSE, AND INJUNCTION—filed June 1, 1961

Comes now BARBARA ELFBRANDT, the plaintiff in the above-entitled action, for herself and for all others similarly situated as herself, and alleges as follows:

I

The plaintiff, BARBARA ELFBRANDT, is a resident of Pima County, Arizona; she was employed by the defendant Amphitheater School District No. 10, Pima County, Arizona, under a teaching contract dated June 1, 1960, covering the academic period September 1, 1960, through June 8, 1961, in the capacity of Eighth Grade teacher of Language and Social Studies. She is presently [fol. 3] an employee of the State of Arizona, within the meaning of Subsection B, S 38-231, Chapter 2: QUALIFICATION AND TENURE, Title 38, PUBLIC OFFICERS AND EMPLOYEES, Arizona Revised Statutes 1956. She is presently employed by the Board of Trustees of Amphitheater School District No. 10, Pima County, Arizona, under Teacher's Contract dated April 24, 1961, for the period of August 31, 1961, through June 7, 1962, a copy of which contract is attached hereto as Exhibit "A" and made a part hereof for all purposes.

By reason of her being a State employee within the meaning of the aforesaid law of the State of Arizona, she is similarly situated as to all other employees of the State and therefore a suitable party to bring this action on behalf of all persons denoted within subsection B of Sec. 38-231, Chapter 2, Title 38, ARS 1956:

> "For the purposes of this section, the term officer or employee means any person elected, appointed, or employed, either on a part-time, or full-time basis, by the state, or any of its political subdivisions or

[fol. 4] any county, city, town, municipal corporation, school district, public educational institution, or any board, commission or agency of any of the foregoing."

II

The defendants are as follows:

IMOGENE R. RUSSELL, L. E. BOOL and MARTHA L. ELLIOTT are duly elected and qualified members of the Board of Trustees of Amphitheater Elementary School District No. 10, and Amphitheater School is a duly qualified school under the laws of the State of Arizona.

PAUL J. FANNIN is the duly elected, qualified and acting Governor of the State of Arizona.

ROBERT W. PICKRELL is the duly elected, qualified and acting Attorney General of the State of Arizona, charged by law with the duty of enforcing and interpreting on behalf of the State officials, the Constitution, Statutes and Laws of the State of Arizona, and with serving as legal advisor to the Board of Regents.

JEWEL W. JORDAN is the duly elected, qualified and acting Auditor of the State of Arizona.

[fol. 5] LYNN M. LANEY, O. D. MILLER, SAMUEL H. MORRIS, JOHN G. BABBITT, ELWOOD W. BRADFORD, VIVIAN LAYTI BOYSEN, GEORGE W. CHAMBERS and LEON LEVY are the duly qualified and acting members of the Board of Regents, and W. W. DICK, State Superintendent of Public Instruction and PAUL J. FANNIN, Governor of the State of Arizona, are ex-officio members of the Board of Regents.

FLORENCE REECE is the duly elected, qualified and acting Superintendent of Schools of Pima County, Arizona;

ROBERT D. MORROW is the duly elected, qualified and acting Superintendent of Tucson School District #1, Pima County, Arizona.

JACOB C. FRUCHTHENDLER, DELBERT L. SECRIST, NAN LYONS, NORVAL W. JASPER and WIL-

LIAM J. PISTOR, are the duly elected, qualified and acting members of the School Board of Tucson School District #1, Pima County, Arizona.

RICHARD A. HARVILL is the duly acting and qualified President of the University of Arizona.

The named defendants are sufficiently representative of the class of officials of the State of Arizona who may in part by, or are, authorized, or who may be interpreted [fol. 6] to be authorized, in whole or in part, to undertake a duty or act in connection with the aforesaid statute (Title 38, Public Officers and Employees, Chapter 2, Sec. 38-231, A.R.S. 1956) as set forth in Subsection A thereof:

> "In order to insure the statewide application of this section on a uniform basis, each board, commission, agency, and independent office of the state, and of any of its political subdivisions, and of any county, city, town, municipal corporation, school district, and public educational institution shall immediately upon the effective date of this act completely reproduce Sec. 38-231 as set forth herein, to the end that the form of written oath or affirmation required herein shall contain all of the provisions of said section for use by all officers and employees of all boards, commissions, agencies and independent officers."

The named defendants are sufficiently representative to be of a class in connection with the questions involved [fol. 7] in this litigation, being so representative of the interests of all such persons similarly situated as to afford this litigation the legal characteristics of an action against a class of defendants, to-wit, all the aforesaid boards, commissions, agencies and independent offices of the State.

III

The plaintiff Barbara Elfbrandt is informed and therefore believes that pursuant to the aforementioned Act, the defendants have made or are making demand upon all of their subordinate employees or associates as named with-

in the foregoing Act, that they sign or affirm a document containing a form of Statement substantially copied after the words of Sec. 38-231, Chapter 2, Title 38, A.R.S. 1956.

The plaintiff is also informed and therefore believes that each such document contains substantially the wording of the Oath as contained in subsection G and subsection E of Sec. 38-231, Chapter 2, Title 38, A.R.S. 1956.

Pursuant to the Act, the defendant Board of Trustees [fol. 8] of Amphitheater Elementary School District No. 10: IMOGENE R. RUSSELL, L. E. BOOL and MARTHA L. ELLIOTT, have, through their duly authorized agents, demanded that the plaintiff BARBARA ELFBRANDT sign, swear to or affirm an Oath, a copy of which document is attached hereto and marked "Exhibit B." The plaintiff has been informed by the defendant Trustees that unless she complies with such demand her employment will be terminated by the defendants.

IV

The word "oath" and the word "affirmation" are used interchangeably herein, and wherever either appears, it is meant to indicate both oath and affirmation.

V

The plaintiff is informed and therefore believes that other defendants are demanding of their employees or subordinates immediate compliance with Sec. 38-231, Chapter 2, Title 38, A.R.S. 1956, as has been demanded of her, although the effective date of the Act was March 30, 1961, and subsection C thereof allows the empoyee elected, appointed or employed prior to the effective date [fol. 9] of the Act, ninety (90) days after said effective date—to-wit: till June 28, 1961, within which to take and subscribe to the form of oath or affirmation.

The plaintiff alleges that by this demand for her immediate compliance, (see Exhibit "C" attached hereto and made a part hereof), her rights under subsection C of said Act are being now violated; and, upon her in-

formation and belief that such demand for immediate compliance is being made upon other plaintiffs, alleges that their rights are also now being violated.

VI

The terms, provisions and requirements of the Act and the oath are in violation of the rights, privileges and immunities of both the plaintiff and all other employees, officers of the State of Arizona as defined in the Act, under the Constitution of the United States in the following particulars:

1. They violate the rights guaranteed under the First Amendment as made applicable to the States by the Fourteenth Amendment;
2. They violate the rights guaranteed under the Fifth [fol. 10] Amendment as made applicable to the States by the Fourteenth Amendment;
3. They deprive the plaintiffs of their rights without due process of law and deny them the equal protection of the laws as guaranteed by the Fourteenth Amendment;
4. They constitute a Bill of Attainder contrary of Article 1, Section 10; and
5. They violate the rights guaranteed under the Sixth Amendment as made applicable to the States by the Fourteenth Amendment.

VII

The terms and provisions of the Act and the oath are in violation of the rights, privileges and immunities of the plaintiffs and all other employees—officers of the State of Arizona as defined in the Act, in the following particulars:

1. They are a denial of the fundamental principals essential to the security of individual rights and the perpetuity of free government, guaranteed by Article 2, Section 1 of the Arizona Constitution.
2. They are a denial of the right of due process of [fol. 11] law: that no person shall be deprived life, liberty, or property without due process of law, guaranteed by Article 2, Section 4.

3. They are a denial of the right of petition and of the people peaceably to assemble for the common good, which shall never be abridged, as guaranteed by Article 2, Section 5.

4. They violate the right of every person to freely speak, write and publish on all subjects, as guaranteed by Article 2, Section 6.

5. They violate the right to the method of administering an oath or affirmation so as to be consistent with and binding upon the conscience of the person to whom such oath or affirmation may be administered, as guaranteed by Article 2, Section 7.

6. They violate the right of a person not to be disturbed in his private affairs, as guaranteed by Article 2, Section 8.

7. They violate Article 2, Section 10.

8. They are violative of Article 2, Section 12.

[fol. 12] 9. They violate Article 2, Section 13, guaranteeing equal privileges and immunity of the laws.

10. They violate Article 2, Section 15.

11. They violate Article 2, Section 23, guaranteeing the right of jury.

12. They are violative of the guarantees contained in Article 2, Section 24.

13. They constitute a Bill of Attainder, contrary to Article 2, Section 25. They further violate Article 2, Section 25, in being "ex-post-facto" in their operation.

14. They are violative of Article 2, Section 28.

15. They are violative of Article 2, Section 33, in that they attempt to take away rights retained by the people.

VIII

This action is brought by the plaintiff for and on behalf of herself and all others similarly situated, in accordance with the Declaratory Judgment Act of this State, for the purpose of testing and determining the Constitutionality [fol. 13] of the Act and the rights of the defendants to establish, enforce, carry out and administer the provisions thereof through the insistence that the plaintiffs and other State Employees, officers, as defined, execute the oath or affirmation.

Unless the defendants be restrained from enforcing, carrying out and administering the provisions of the Act and from insisting upon the execution of the oath, or, upon their failure to execute the oath, refusing to continue to employ or to continue to make payments of otherwise due and obligatory salaries and emoluments, the plaintiff and others so situate will suffer great and irreparable injury not compensable in monetary damages.

IX

Plaintiffs have no speedy and adequate remedy at law. In the event the plaintiffs insist on maintaining their aforedescribed Constitutional rights, and the rights retained by the people and guaranteed retained by the Constitution of Arizona, and refuse to execute the oath demanded from them, they will be subject to immediate discharge from their empoyment and/or immediate loss [fol. 14] of their otherwise earned and entitled salaries and emoluments.

WHEREFORE, plaintiff demands relief as follows:

1. That the Court issue its Temporary Restraining Order:

Restraining each of the named defendants and all other defendants within the class of the defendants named herein, either upon service of a copy of this Complaint and the Order of the Court, or upon their being informed of this Complaint and its contents and the requested Temporary Restraining Order of the Court, until further order of the Court, to be made at the time of the hearing on the Order to Show Cause hereinafter prayed for,

From establishing, enforcing, carrying out, or administering the provisions of Chapter 2, Title 38, Sec. 38-231, A.R.S. 1956; or from withholding or denying, through the use of the oath or otherwise, the payments of salaries and/or emoluments to employees.

2. That the Court issue its Order to Show Cause, ordering the named defendants to appear for and on behalf [fol. 15] of themselves and all other defendants situated in the same condition, as set forth in the Complaint here-

in, at a time and place to be set by the Court, then and there to show cause why the aforesaid Restraining Order should not be made permanent pendente lite.

3. That the defendants named and other defendants within the class as defined in subsection A, Title 38, Chapter 2, Sec. 38-231, A.R.S. 1956 and indicated as officers or employees to enforce the provisions thereof, be permanently enjoined from enforcing the provisions of Sec. 38-231, A.R.S. 1956, Title 38, Chapter 2, and from requiring any oath or affirmation pursuant to said Act.

4. Plaintiff further demands an adjudication by this Court that Sec. 38-231, Chapter 2, Title 38, A.R.S. 1956 violates the Constitution of the United States and the Constitution of the State of Arizona and is therefore void and of no effect.

5. Plaintiff further demands that the Court issue its Temporary Restraining Order, restraining the defend- [fol. 16] ants from attempting to enforce the giving of any oath or the denial of any salary pending the giving of the oath prior to June 28, 1961, as being in violation of the terms of the Statute.

6. That the Court issue its Order to Show Cause, ordering the named defendants to appear for and on behalf of themselves and all other defendants similarly situate as set forth herein, at a time and place to be set by the Court, to show cause why the Temporary Restraining Order demanded in Paragraph 5 herein, should not be made permanent pendente lite.

And such other and further relief as the Court may deem just and equitable in the premises.

/s/ Barbara Elfbrandt
BARBARA ELFBRANDT,
Plaintiff

[*Duly sworn to by W. Edward Morgan jurat omitted in printing*]

[fol. 17] (Attached to the Complaint as "Exhibit A" is a Teacher's Contract dated April 24, 1961, between Barbara Elfbrandt and the Board of Trustees of Amphitheater School District No. 10.)

(Attached to the Complaint as "Exhibit B" is a copy of Loyalty Oath made out in the name of Barbara Elfbrandt but not bearing her signature.)

[fol. 18] (Attached to the Complaint as "Exhibit C" is a copy of Amphitheater Schooletter dated May 1, 1961.)

* * * *

ORDER TO SHOW CAUSE—June 6, 1961

A verified Complaint having been filed in the above entitled matter, and good cause therefor appearing,

IT IS THE ORDER OF THIS COURT that you, the following defendants:

IMOGENE R. RUSSELL, L. E. BOOL and MARTHA L. ELLIOTT, members of the Board of Trustees of Amphitheater Elementary School District No. 10, Pima County, State of Arizona;

PAUL J. FANNIN, Governor of the State of Arizona;

ROBERT W. PICKRELL, Attorney General of the State of Arizona;

JEWEL W. JORDAN, State Auditor;

LYNN M. LANEY, O. D. MILLER, SAMUEL H. MORRIS, JOHN G. BABBITT, ELMWOOD W. BRAD-[fol. 19] FORD, VIVIAN LAYTI BOYSEN, GEORGE W. CHAMBERS and LEON LEVY, members of the Board of Regents; and W. W. DICK, State Superintendent of Public Instruction, and PAUL J. FANNIN, Governor, ex-officio members of the Board of Regents;

FLORENCE REECE, Pima County Superintendent of Schools;

ROBERT D. MORROW, Superintendent of Tucson School District #1;

JACOB C. FRUCHTHENDLER, DELBERT L. SECRIST, NAN LYONS, NORVAL W. JASPER and WILLIAM J. PISTOR, School Board, Tucson District #1; and

RICHARD A. HARVILL, President of the University of Arizona,

appear before the Court, in Court Room No. —— Pima County Superior Court in the Court House at Tucson, Pima County, Arizona, on Thursday, the 15th day of June, 1961, at 8:30 a.m. of that day, then and there to show cause, if any you have, why each of you and all other defendants within the class of defendants indicated in the Complaint, should not be restrained and enjoined from establishing, enforcing, carrying out or administering the provisions of Chapter 2, Title 38, Sec. 38-231, [fol. 20] A.R.S. 1956 as amended, and/or from withholding or denying through the demand for the affirmation or oath, the payments of any salaries or emoluments to the named plaintiff, Barbara Elfbrandt, or to the employees and officers and others as defined in said Act, pendente lite.

AND IT IS FURTHER ORDERED that the Clerk of Court issue two true copies of this Order, and a copy of this Order under the Seal of this Court, together with a copy of the verified Complaint filed herein, be served upon you at least five (5) days before the time fixed for the hearing thereof.

DONE IN OPEN COURT at 4:25 p.m., this 6th day of June, 1961.

/s/ Lee Garrett
Judge

* * * *

[fol. 21] (The following is attached to Motion to Dismiss:)

State of Arizona
House of Representatives
Twenty-Fifth Legislature
First Regular Session

CHAPTER 108, HOUSE BILL NO. 115

AN ACT

RELATING TO CRIMES; TO THE PROTECTION OF THE SAFETY OF THE STATE OF ARIZONA AND THE FUNDAMENTAL LIBERTIES OF ITS CITIZENS FROM THE INTERNATIONAL COMMUNIST CONSPIRACY; PROSCRIPTION OF THE COMMUNIST PARTY IN ARIZONA; DEFINING THE CRIME OF SEDITION; REQUIRING LOYALTY OATHS BY PUBLIC OFFICERS AND EMPLOYEES; PRESCRIBING PENALTIES; AMENDING TITLE 16, CHAPTER 2, ARTICLE 1, ARIZONA REVISED STATUTES, BY ADDING SECTIONS 16-205 AND 16-206; AMENDING TITLE 13, CHAPTER 2, ARIZONA REVISED STATUTES, BY ADDING ARTICLE 40.1, SECTIONS 13-707 and 13-707.01, AND AMENDING SECTIONS 38-231 and 38-233, ARIZONA REVISED STATUTES.

Be it enacted by the Legislature of the State of Arizona:

Section 1. This act may be cited as the Arizona Communist Control Act of 1961.

[fol. 22] Sec. 2. Title 16, Chapter 2, Article 1, Arizona Revised Statutes, is amended by adding Section 16-205, to read:

16-205. *Findings of fact and statement of public policy by the legislature of the State of Arizona concerning steps which must be taken to protect the fundamental rights of the citizens of this state and the safety of this state from international Communistic conspiracy.*

A. Upon evidence and proof which has been presented before this Legislature, other State Legislatures, the Congress of the United States and in the courts of the United States, and in the courts of the several states; and although recognizing that the federal Constitution vests the conduct of foreign relations in the federal government and the federal Constitution guarantees to the several states a republican form of government and protection against foreign invasion and domestic violence, this state has the duty of self-preservation and the taking [fol. 23] of necessary measures to cooperate with the federal government in the preservation of the Peace and safety of the State of Arizona and in order to carry out Article 2, Section 21 of the Arizona Constitution relating to free and equal elections and Article 7, Section 12 of the Arizona Constitution relating to the enactment of laws to secure the purity of elections; and in order to guard against the abuse of the elective franchise by the Communist Party of the United States which from time to time has qualified as a purported legitimate political party in the State of Arizona; and in order to secure to the citizens of this State their unalienable personal rights and liberty of conscience secured by the provisions of the Constitution of Arizona and in order to protect the peace and safety of the State of Arizona from the overthrow of its constitutional government by force or violence, and of its political subdivisions, the Legislature of the State of Arizona finds and declares that, unlike other political parties which have evolved their policy and programs through public means, by the reconciliation of a wife [fol. 24] variety of individual views, and submit those policies and programs to the electorate at large for approval or disapproval, the policies and programs of the Communist Party are prescribed for it by the foreign leaders of the world Communist movement.

B. The Communist Party members have no part in determining its goals, and are not permitted to voice dissent to party objectives. Unlike members of political parties, members of the Communist Party are recruited for indoctrination with respect to its objectives and methods, and are organized, instructed, and disciplined

to carry into action slavishly the assignments given them by their hierarchical chieftains. Unlike legitimate political parties, the Communist Party acknowledges no constitutional or statutory limitations upon its conduct or upon that of its members. The Communist Party is relatively small numerically, and gives scant indication of capacity ever to attain its ends by lawful policical means. The peril inherent in its operation arises not from its numbers, but from its failure to acknowledge any limi-
[fol. 25] tation as to the nature of its activities, and its dedication to the proposition that the present constitutional government of the United States, the governments of the several states, and the government of the State of Arizona and its political subdivisions ultimately must be brought to ruin by any available means, including resort to force and violence.

C. The establishment of a totalitarian dictatorship in any country results in the supression of all opposition to the party in power, the subordination of the rights of individuals to the state, the denial of fundamental rights and liberties which are characteristic of a representative form of government such as freedom of speech, of the press, of assembly, and of religious worship, and said totalitarian dictatorship ruthlessly supresses academic freedom and inquiry into any human knowledge except the official doctrine of the dictatorship. This results in the maintenance of control over the people through fear, terrorism, and brutality.

[fol. 26] D. It is the public policy of this state to protect the safety of the constitutional government of the State of Arizona by constitutional means and at the same time protect the rights of the members of our free society to speak, to assemble and to inquire, including the principle of academic freedom which by fostering healthy self-criticism is especially vital in the progress of man's moral values and in man's exploration of the secrets of the atom on this planet and in outer space. To protect the safety of this state and the right of free citizens in a free society to inquire and to understand totalitarianism, it is essential that the schools, colleges and universities teach objectively and critically the governmental and

social forms of past and present totalitarian slave states, including the foreign languages spoken therein.

The rights set forth in this subsection do not include the right to embrace Communism or to attempt to persuade others to embrace Communism.

E. The direction and control of the world Communist movement is vested in and exercised by the Communist [fol. 27] dictatorship of a foreign country.

F. The Communist dictatorship of such foreign country, in exercising such direction and control and in furthering the purposes of the world Communist movement, establishes or causes the establishment of, and utilizes, in various countries, action organizations which are not free and independent organizations, but are sections of a world-wide Communist organization and are controlled, directed, and subject to the discipline of the Communist dictatorship of such foreign country.

G. The Communist action organizations so established and utilized in various countries, acting under such control, direction, and discipline, endeavor to carry out the objectives of the world Communist movement by bringing about the overthrow of existing governments by any available means, including force or violence if necessary, and setting up Communist totalitarian dictatorships which will be subservient to the most powerful existing Communist totalitarian dictatorship. Although such organizations usually designate themselves as political par- [fol. 28] ties, they are in fact constituent elements of the world-wide Communist movement and promote the objectives of such movement by conspiratorial and coercive tactics, instead of through the democratic processes of a free elective system or through the freedom-preserving means employed by a legitimate political party which operates as an agency by which people govern themselves.

H. In the United States and in this state those individuals who knowingly and wilfully participate in the world Communist movement, when they so participate, in effect repudiate their allegiance to the United States and this state, and in effect transfer their allegiance to the foreign country in which is vested the direction and control of the world Communist movement.

I. The Communist movement in the several states is an organization numbering thousands of adherents, rigidly and ruthlessly disciplined. Awaiting and seeking to advance at a moment when the several states may be so far extended by foreign engagements, so far divided in [fol. 29] counsel, or so far in industrial or financial straits, that overthrow of the Government of the United States and of the several states by force or violence may seem possible of achievement, it seeks converts far and wide by an extensive system of schooling and indoctrination. Such preparations by Communist organizations in other countries, including the recent events in the neighboring country of Cuba, have aided in supplanting existing governments. The Communist organization in the United States and in the several states, pursuing its stated objectives, the recent successes of Communist methods in other countries, and the nature and control of the world Communist movement itself, present a clear and present danger to the security of the government of the United States, the governments of the several states, and the government of the State of Arizona, including its political subdivisions, that make it necessary that the State of Arizona enact appropriate legislation, recognizing the existence of such world-wide Communist conspiracy, and designed to prevent it from accomplishing its purposes in this state and its political subdivisions. There- [fol. 30] fore, the Communist Party should not be permitted to avail itself to the privileges, rights and immunities conferred by law upon legitimate political parties.

Sec. 3. Title 16, Chapter 2, Article 1, Arizona Revised Statutes, is amended by adding Section 16-206, to read:

16-206. *Proscription of Communist Party of United States, its successors, and subsidiary organizations*

The Communist Party of the United States, or any successors of such party regardless of the assumed name, the object of which is to overthrow by force or violence the Government of the United States, or the Government of the State of Arizona, or its political subdivisions shall not be entitled to be recognized or certified as a political

party under the laws of the State of Arizona and shall not be entitled to any of the privileges, rights or immunities attendant upon legal political bodies recognized under the laws of the State of Arizona, or any political subdivision thereof; whatever rights, privileges or immunities [fol. 31] shall have heretofore been granted to said Communist Party of the United States as defined in this section, or to any of its subsidiary organizations, by reason of the laws of the State of Arizona, or of any political subdivision thereof, are hereby terminated and shall be void.

Sec. 4. Title 13, Chapter 2, Arizona Revised Statutes, is amended by adding Article 40.1, Sections 13-707 and 13-707.01, to read:

ARTICLE 40.1 SEDITION

13-707. *Definition of sedition; parties; punishment*

A. A person who knowingly or wilfully commits, or aids in the commission of any act to overthrow by force or violence the government of this state, or of any of its political subdivisions, is guilty of sedition against the State of Arizona.

B. A person who knowingly or wilfully advocates the overthrow by force or violence the government of this state, or of any of its political subdivisions, is guilty of sedition against the State of Arizona.

C. A person who knowingly or wilfully becames or [fol. 32] remains a member of the Communist Party of the United States, or its successors, or any of its subordinate organizations, or any other organization having for one of its purposes the overthrow by force or violence of the government of the State of Arizona, or any of its political subdivisions, and said person had knowledge of said unlawful purpose of said Communist Party of the United States or of said subordinate or other organization, is guilty of sedition against the state.

D. Any person who violates any provisions of this article is guilty of a felony, and upon conviction thereof shall be punished by a fine of not more than twenty

thousand dollars, or imprisonment in the state prison for not more than twenty years, or both.

13-707.01 *Disqualification to hold office*

Any person who is convicted of violating any provision of this article shall automatically be disqualified and barred from holding any office, elective or appointive, or any position of trust, profit or employment with this state, or any political subdivision of this state, or any county, [fol. 33] city, town, municipal corporation, school district, public educational institution, or any board, commission or agency of any of the foregoing.

Sec. 5. Sec. 38-231, Arizona Revised Statutes, is amended to read:

38-231. *Officers and employees required to take loyalty oath; form; Penalty*

A. In order to insure the state-wide application of this section on a uniform basis, each board, commission, agency, and independent office of the state, and of any of its political subdivisions, and of any county, city, town, municipal corporation, school district, and public educational institution, shall immediately upon the effective date of this act completely reproduce Section 38-231 as set forth herein, to the end that the form of written oath or affirmation required herein shall contain all of the provisions of said section for use by all officers and empoyees of all boards, commissions, agencies and independent offices.

B. For the purposes of this section, the term officer [fol. 34] or employees means any person elected, appointed, or employed, either on a part-time or full-time basis, by the state, or any of its political subdivisions or any county, city, town, municipal corporation, school district, public educational institution, or any board, commission or agency of any of the foregoing.

C. Any officer or employee elected, appointed, or employed prior to the effective date of this act shall not later than ninety days after the effective date of this act take and subscribe the form of oath or affirmation set forth in this section.

D. Any officer or employee within the meaning of this section who fails to take and subscribe the oath or affirmation provided by this section within the time limits prescribed by this section shall not be entitled to any compensation unless and until such officer or employee does so take and subscribe to the form of oath or affirmation set forth in this section.

E. Any officer or employee as defined in this section having taken the form of oath or affirmation prescribed [fol. 35] by this section, and knowingly or wilfully at the time of subscribing the oath or affirmation, or at any time thereafter during his term of office or employment, does commit or aid in the commission of any act to overthrow by force or violence the government of this state or of any of its political subdivisions, or advocates the overthrow by force or violence of the government of this state or of any of its political subdivisions, or during such term of office or employment knowingly and wilfully becomes or remains a member of the Communist Party of the United States or its successors or any of its subordinate organizations or any other organization having for one of its purposes the overthrow by force or violence of the government of the state of Arizona or any of its political subdivisions, and said officer or employee as defined in this section prior to becoming or remaining a member of such organization or organizations had knowledge of said unlawful purpose of said organization or organizations, shall be guity of a felony and upon conviction thereof shall be subject to all the penalties for per- [fol. 36] jury; in addition, upon conviction under this section, the officer or employee shall be deemed discharged from said office or employment and shall not be entitled to any additional conpensation or any other emoluments or benefits which may have been incident or appurtenant to said office or employment.

F. Any of the persons referred to in Article XVIII, Section 10 of the Arizona Constitution as amended, related to the employment of aliens, shall be exempted from any compliance with the provisions of this section.

G. In addition to any other form of oath or affirmation specifically provided by law for an officer or em-

ployee, before any officer or employee enters upon the duties of his office or employment, he shall take and subscribe the following oath or affirmation:

State of Arizona, County of ————————.
I, (type or print name) do solemnly swear (or affirm) that I will support the Constitution of the United States and the Constitution and laws of the State of Arizona; that I will bear true faith and allegiance to [fol. 37] the same, and defend them against all enemies, foreign and domestic, and that I will faithfully and impartially discharge the duties of the office of (name of office) according to the best of my ability, so help me God (or so I do affirm).

————————————
(Signature of officer or employee)

Sec. 6. Sec. 38-233, Arizona Revised Statutes, is amended to read:

38-233. *Filing oaths of record*

A. The official oaths of state elective officers shall be filed of record in the office of the Secretary of State. The official oaths of all other state officers and employees shall be filed of record in the office of the employing state board, commission or agency.

B. The official oaths of notaries public and of elective county and elective precinct officers shall be filed of record in the office of the County Recorder, except the oath of the Recorder, which shall be filed with the Clerk of the Board of Supervisors. The official oaths of all other county and precinct officers and employees shall be filed [fol. 38] of record in the office of the employing county or precinct board, commission or agency.

C. The official oaths of all city, town or municipal corporation officers or employees shall be filed of record in the respective office of the employing board, commission or agency of the cities, towns and municipal corporations.

D. The official oaths of all officers and employees of all school districts shall be filed of record in the office of the Superintendent of Public Instruction.

E. The official oaths of all officers and employees of each public educational institution except school districts shall be filed of record in the respective offices of said public educational institutions.

F. The official oath or affirmation required to be filed of record shall be maintained as a permanent official record.

Sec. 7. *Saving clause*

This act does not apply to any offense committed prior to the effective date of this act, and any such offense [fol. 39] is punishable as provided by the statute in force at the time the offense was committed.

Sec. 8. *Severability*

If any provision of this act or the application thereof to any person or circumstance is held invalid, the invalidity shall not affect other provisions or applications of the act which can be given effect without the invalid provision or application, and to this end the provisions of this act are severable.

Sec. 9. *Emergency*

To preserve the public peace, health and safety it is necessary that this act become immediately operative. It is therefore declared to be an emergency measure, to take effect as provided by law.

Approved by the Governor—March 30, 1961.

Filed in the Office of the Secretary of State—March 30, 1961.

(FILED: June 15, 1961.)

[fol. 40] ANSWER—filed June 15, 1961

COMES NOW Robert W. Pickrell, Attorney General of the State of Arizona, one of the defendants herein, and for himself and on behalf of the following defendants, Paul J. Fannin, Governor of the State of Arizona, Jewel J. Jordan, State Auditor, Lynn M. Laney, Sr., O. D. Miller, Samuel H. Morris, John G. Babbitt, Elmwood W. Bradford, Vivian Layti Boysen, George W. Chambers and Leon Levy, members of the Board of Regents, W. W. Dick, State Superintendent of Public Instruction, and Paul J. Fannin, as Ex-Officio members of the Board of Regents, and Richard A. Harvill, President of the University of Arizona, answers the Complaint of the plaintiff herein and admits, alleges and denies as follows:

I

The above defendants are without knowledge as to the allegations contained in Paragraph I concerning Barbara Elfbrandt, and therefore deny the same. The defendants further deny that said Barbara Elfbrandt is a suitable party to bring this action on behalf of all persons denoted [fol. 41] within subsection D of Section 38-231, A.R.S., 1956, as amended.

II

The defendants admit the allegations concerning the named persons contained in Paragraph II of the Complaint, but deny all other allegations contained in said paragraph.

III

Defendants deny that they have made any demand on any subordinate employee as alleged in Paragraph III of the Complaint, and specifically deny that any demand was made upon the plaintiff to sign, swear to or affirm any oath, or that upon the failure for her to do so that her employment would be terminated.

IV

The defendants deny the allegations contained in Paragraph IV of the Complaint.

V

Defendants deny the allegations contained in Paragraphs V, VI, VII, VIII and IX of the Complaint.

WHEREFORE, having fully answered all of the allegations contained in the Complaint, the defendants herein [fol. 42] demand judgment in favor of the defendants and pray that plaintiff take nothing by reason of her Complaint.

ROBERT W. PICKRELL
The Attorney General

/s/ Philip M. Haggerty
PHILIP M. HAGGERTY
Assistant Attorney General
159 Capitol Building
Phoenix, Arizona
Attorneys for Defendants

[*Duly sworn to by Philip M. Haggerty jurat omitted in printing*]

[fol. 43] * * *

[fol. 44]

MOTION TO AMEND—filed June 20, 1961

COMES NOW the plaintiff and moves to amend her Complaint in the above-entitled action, as follows:

I

Moves to amend Section I of plaintiff's Complaint, the second paragraph thereof, by adding the words AND PROPER in line four, and the words AS AMENDED in line 6, so that the second paragraph of Section I of plaintiff's Complaint reads as follows: "By reason of her being a State employee within the meaning of the aforesaid law of the State of Arizona, she is similarly situated as to all other employees of the State and therefore a suitable and proper party to bring this action on behalf

of all persons denoted within subsection B of Sec. 38-231, Chapter 2, Title 33, A.R.S. 1956, as amended."

II

Moves to amend Section II of plaintiff's Complaint, page 3, the third paragraph on page 3, by striking the word AFORESAID.

[fol. 45]

III

Moves to amend Section III of plaintiff's Complaint, page 4, third paragraph, by striking the last sentence, to-wit: "The plaintiff has been informed by the defendant trustees that unless she complies with such demand her employment will be terminated by the defendants", and substitute the words and sentence, as follows: "The plaintiff has been informed by the defendant trustees that unless she complies to the obligation to affirm or swear to the oath provided in the statute in question, her salary will be withheld in accordance with the provisions of the statute."

IV

The plaintiff moves to strike Section V and to substitute for it the following Section V, to-wit: "The plaintiff is informed and therefore believes that other defendants are demanding of their employees or subordinates immediate compliance with Sec. 28-231, Chapter 2, Title 38, A.R.S. 1956, as amended, although the effective date of the Act was March 30, 1961, and subsection C thereof [fol. 46] allows the employee elected, appointed or employed prior to the effective date of the Act, ninety (90) days after said effective date—to-wit: till June 28, 1961, within which to take and subscribe to the form of oath or affirmation.

"The plaintiff alleges that by this demand for immediate compliance, (see Exhibit "C" attached hereto and made a part hereof), the plaintiffs' rights under subsection C of said Act are being now violated."

THIS MOTION is being made in conformity with the stipulation of the parties that each party might file

amended pleadings by the end of Wednesday, June 21, 1961.

DATED this 20th day of June, 1961.

/s/ W. Edward Morgan
W. EDWARD MORGAN
Attorney for Plaintiffs
45 West Pennington
Tucson, Arizona

[fol. 47]

NOTICE OF APPEAL—filed July 3, 1961

Notice is hereby given that the above-named plaintiff appeals to the Supreme Court of the State of Arizona from the judgment entered by the above-entitled Court in the above-entitled action on June 30, 1961, wherein the Court found that Section 38-231 A.R.S. and Section 38-231 A.R.S. as amended laws of 1961, Chapter 108, Section 5, is constitutional in all respects and directed the Clerk to enter judgment in favor of the defendants and against the plaintiff on her Complaint.

DATED this 1st day of July, 1961.

/s/ W. Edward Morgan
W. EDWARD MORGAN
45 West Pennington, Suite 407
Tucson, Arizona
Attorneys for Plaintiff

Copy mailed this 3rd day of July, 1961, to:

ROBERT PICKRELL
Attorney General of the
State of Arizona
Capitol Building
Phoenix, Arizona

HARRY ACKERMAN
Pima County Attorney
Pima County Court House
Tucson, Arizona

[fol. 48]

STIPULATION FOR WAIVER OF BOND FOR COSTS ON APPEAL—filed July 10, 1961

[omitted in printing]

[fol. 49]

MEMORANDUM IN SUPPORT OF RESTRAINING ORDER—filed July 13, 1961

Two aspects of the need for an immediate restraining order address themselves from a review of the fact situation from a review of the fact situation sworn to in the verified Complaint.

I

The first and most immediate is that of the unlawful speed-up undertaken by the defendant Board of Trustees of Amphitheater Elementary School District No. 10, and, from information received by the affiant, by other members of the class of defendants included in this Complaint, of now demanding the swearing to or the affirmation of the oath provided in the statute, and of threatening immediate cessation of salary.

The statute provides that the plaintiff and all others so situated, have ninety (90) days from the effective date of the statute (March 30, 1961) to June 28, 1961, in which to sign or affirm the oath. Therefore, in order for the plaintiffs to enjoy the time allowed by the law it-
[fol. 50] self, the defendants should immediately be restrained from enforcing their demands upon the plaintiffs for immediate signing or affirmation of the oath, and should immediately be restrained from denying the plaintiffs temporarily their salaries or emoluments.

II

The second aspect of the situation is that the plaintiff believes the Act to be unconstitutional. This in turn gives rise to two major legal considerations, in particular in relation to the request for immediate relief by means of a Temporary Restraining Order and Order to Show Cause:

ONE: Is there sufficient showing by the plaintiff that the Act is unconstitutional, to warrant such relief? and

TWO: Are the circumstances of the case such as to demand the immediate relief sought?

Taking the matters in reverse order, the immediate need for a restraining order should be obvious in that there is no plain, speedy relief for the plaintiff or any of the persons similarly situated, because if they refuse to [fol. 51] sign the oath or make the affirmation they will immediately be (1) condemned publicly as being subversive; (2) brought into ridicule and disgrace with a large number of people; (3) be denied the right of employment; (4) If it does not deny them the right of employment, they will immediately be without salary for their employment.

All of these consequences are immediate and direct and unless the defendants and the class of defendants are restrained, such consequences will follow.

See: A.R.S. 12-1801.

The second major consideration (Question ONE herein) is the more fundamental one, and that gives rise to the question as to the unconstitutionality of the Act. The plaintiff's position is that the Act is manifestly unconstitutional. Let us examine the various aspects of the Act as to unconstitutionality:

A. The Act is so vague as to violate the provisions of both the Arizona State Constitution and the United States Constitution guaranteeing that a criminal act [fol. 52] shall be so clear as to give due notice to the defendant of the nature of the crime. See Arizona Constitution, Article 2, Sec. 24. See United States Constitution, Amendment VI, and Amendment XIV.

1. The Act is vague as follows:

(a) What is, and who defines, a successor or organization of the Communist Party?

(b) A subordinate organization of the Communist Party? Is there any reasonable definition any place of what a subordinate organization of the Communist Party would be?

2. What is the quantum of knowledge legally sufficient to place a person within that classification of defendants who

> "had knowledge of said unlawful purpose of said organization or organizations"?

How much knowledge is knowledge of an unlawful purpose?

3. The Act is further completely vague in its administrative provisions. In Sec. 38-231, A, it provides that:

> ". . . . each board, ... shall immediately . . . . completely reproduce Sec. 38-231 . . . . to the end
> [fol. 53] that the form of written oath or affirmation required herein shall contain all of the provisions of said section for use by all officers . . . ."

It doesn't say they shall provide the oath to the officers and employees. It doesn't say whether it be their duty to take the oath to the officers and employees or what they should do after they apparently have printed up the oath.

4. Sec. 38-231 D, says in effect that if the employee does not take the oath for such period of time he shall not be entitled to any compensation. This section is ambiguous at least administratively, in that it does not provide the one who shall decide whether or not the empoyee has or has not taken an oath; it does not provide who shall order that the employee receive no further salary; it does not provide who shall decide when the employee has or has not complied with the section.

5. The Act fails as being so vague that a reasonable man could not reasonably appreciate what conduct would invoke a criminal penalty.

[fol. 54] 6. The Act is unconstitutional for being vague as a result of the disjunction between the oath contained in Paragraph G of Sec. 38-231 and Paragraph E of Sec. 38-231. "G" provides for a loyalty oath. "E" attempts to state what the meaning of the loyalty oath is.

> The simple question which it puts to the light is this; If the oath is the oath that you take in "G", then why the provisions of "E"?

And if the provisions of "E" are necessary to carry out the legislative purpose, then why are they not contained in "G"?

In connection with Paragraph A, Sections 2, 3 and 4, see Am. Jur. Vol. 14, Criminal Law, Paragraphs 19 and 22. See *State* vs. *Menderson*, 57 Ariz. 103, and *U.S.* vs. *People's Fuel and Feed Co.*, 271 F 790, 41 S. Ct. 448.

B. The Act is unconstitutional.

1. The Act violates Article 1, Section 10 of the United States Constitution and Article 2, Section 25, of the Arizona Constitution as being a Bill of Attainder. [fol. 55] Bills of Attainder were considered by the United States Supreme Court in the case of *Cummings* vs. *Mo.*, 4 Wall, 277, 18 L. ed. 356 (1866) and *Ex parte Garland*, 4 Wall. 333, 18 L. ed. 366 (1866), where test oaths for attorneys, priests, candidates for public office and others who may have aided the South during the Civil War, were held to be Bills of Attainder. In *Cummings, supra*, Mr. Justice Field defined a bill of attainder as:

> ". . . a legislative act which inflicts punishment without a judicial trial . . . (the legislature is) creating the deprivation without any of the ordinary forms and guards provided for the security of the citizen in the administration of justice by the established tribunals."

It will be noted that it *is the elimination of the adjudicatory process which offends the prohibition against the bill of attainder*, not the fact that the attaint was ex post facto.

Mr. Justice Field continued:

> "We do not agree with the counsel of Missouri [fol. 56] that 'to punish one is to deprive him of life, liberty or property, and that to take from him anything less than these is no punishment at all.' The learned counsel does not use these terms—life, liberty and property—as comprehending every right known to the law . . . . The deprivation of any rights, civil or political, *previously enjoyed, may be punishment*," 4 Wal. 320, (emphasis supplied).

In *Ex parte Garland, supra,* Mr. Justice Miller, though dissenting, defined a bill of attainder (p. 388):

> "I think it will be found that the following comprise those essential elements of bills of attainder in addition to the one already mentioned (corruption of the blood), which distinquish them from other legislation and which made them so obnoxious to the statesman who organized our government: I. They [fol. 57] were convictions and sentences pronounced by the Legislative Department of government instead of the Judicial. II. The sentence pronounced and the punishment inflicted were determined by no previous law or fixed rule. III. The investigation into the guilt of the accused, if any such were made, was not necessary or generally conducted in his presence or that of his counsel and no recognized rule of evidence governed the inquiry."

This definition was clear and unequivocal. It was followed in U.S. vs. Lovett, 328 U. S. 303, 66 S.Ct. 1073, 90 L. ed. 1252 (1946). Congress denied pay to named Government employees. Mr. Justice Black wrote the opinion of the court, striking down the legislation as a bill of attainder, "a legislative act which inflicts punishment without judicial trial," (p. 315). This Court held that *Garland* and *Cummings* stand for the proposition "that legislative acts, no matter what their form, that apply either to named individuals or to easily ascertainable [fol. 58] members of a group in such a way as to inflict punishment on them without a judicial trial are bills of attainder prohibited by the Constitution."

The Court then went on to say:

> "The effect was to inflict punishment without the safeguards of a judicial trial and 'determined by no previous law or fixed rule.' The Constitution declares that that cannot be done either by a state or by the United States.
>
> "Those who wrote our Constitution well knew the danger inherent in special legislative acts which take away the life, liberty, or property of particular named persons, because the legislature thinks them

guilty of conduct which deserves punishment. *They intended to safeguard the people of this country from punishment without* trial by duly constituted courts." (Emphasis supplied)

The instant case meets every test laid down by these cases. The Court in the cases cited—concerned with [fol. 59] the fact that the adjudication was by the legislature—no issue was made as to whether past, present or prospective conduct was inhibited. The acts were held to be bills of attainder.

Story, in *Commentaries on the Constitution* (5th ed., 1891) Sec. 1344, put it:

> "In such cases, the legislative assumes judicial magistry, pronouncing upon the guilt of the party without any of the common forms and guards of trial, and satisfying itself with proofs, when such proofs are within its reach, whether they are conformable to the rules of evidence or not. In short, in all such cases, the legislature exercises the highest power of sovereignty, and what may be properly deemed an irresponsible despotic discretion, being governed solely by what it deems political necessity or expediency, and too often under the influence of unreasonable fears or unfounded suspicions."

[fol. 60] 2. The Act is also a denial of the due process of law, Article 2, Section 24 of the Arizona Constitution and of the due process and equal protection of the laws as guaranteed by the Fourteenth Amendment to the United States Constitution.

It is violative in that the plaintiffs, as with the particular plaintiff in this case, who has a contract for employment which provides that she shall receive certain remuneration, may have the remuneration denied her under the terms of this Act, without any hearing and with the gross assumption being made that if she doesn't sign the oath she must therefore be an undesirable teacher. Such an ex parte determination without the right of hearing is on its face a denial of due process.

See *Wieman* vs. *Updegraff*, 344 U.S. 183, 73 S. Ct. 215, 97 L.ed. 216.

3. The requirements of the Act are violative of Section 7, Article 2 of the Arizona Constitution, to-wit:

"The mode of administering an oath, or affirma-
[fol. 61] tion, shall be such as shall be most consistent with and binding upon the conscience of the person to whom such oath, or affirmation, may be administered."

construed with Section 12, Article 2 of the Arizona Constitution, to wit:

"No religious qualification shall be required for any public office or employment, nor shall any person be incompetent as a witness or juror in consequence of his opinions on matters of religion. . . ."

The plaintiff is a person who does not believe in a double standard of truth. This belief is predicated upon the moral philosophy of her religion and she therefore may not make either an oath or an affirmation without violating her religious conscience.

In *Adler* vs. *Board of Education*, 342 U.S. 485, 72 S. Ct. 380, 96 L. ed. 517, a case involving the question of the right of the State to screen its teachers, the Court discussess procedural due process and points out that mere membership in the Communist Party only gave rise [fol. 62] to a presumption of unfitness. However, the State provided for a hearing and it was a rebuttable presumption and therefore as long as it was rebuttable there was not a denial of procedural due process.

"Disqualification follows therefore as a reasonable presumption from such membership and support. *Nor is there here a problem of procedural due process. The presumption is not conclusive but arises only in a hearing where the person against whom it may arise has fully opportunity to rebut.* The holding of the Court of Appeals below is significant in this regard:

" 'The statute also makes it clear that . . . . proof of such membership 'shall constitute prima facie evidence of disqualification' for such employment.' "

In *Potts* vs. *Pardee* (220 NY 431, 433, 116 NE 78, 8 ALR 785, 17 NCCA 427):

"The presumption growing out of a *prima facie*
[fol. 63] case . . . remains only so long as there is no substantial evidence to the contrary. When that is offered the presumption disappears and, unless met by further proof, there is nothing to justify a finding based solely upon it." Thus the phrase "*prima facie* evidence of disqualification," as used in the statute, imports a hearing at which one who seeks appointment to or retention in a public school position shall be afforded an opportunity to present substantial evidence contrary to the presumption sanctioned by the *prima facie* eivdence for which subdivision 2 of Section 3002 makes provision. Once such contrary evidence has been received, however, the official who made the order of ineligibility has thereafter the burden of sustaining the validity of that order by a fair preponderance of the evidence.

(Civil Service Law Section 12-a, subd. (d)).

[fol. 64] " 'Should an order of ineligibility then issue, the party aggrieved thereby may avail himself of the provisions for review prescribed by the section of the statute last cited above. In that view there here arises no question of procedural due process.' 301 NY 476, at p. 494, 95 NE (2d) 806, at 814, 815." (Emphasis added).

In our State, the penalty is created by forcing a party not to sign the oath and then subjecting him to the penalty of either denial of employment or denial of salary, without any hearing being afforded to allow the person to overcome the presumption given rise to by the failure to take the oath.

No exceptions are built into the oath taking. For example, what of the innocent professor, who, in the course of his sociological studies, remains a member of such an organization?

What about those parties who may be involved in counter-espionage?

Where there is no such provision for explanation of
[fol. 65] one's membership, then there is a denial of procedural due process.

THE RELATION OF MORALS AND THE BILL OF RIGHTS.

The Bill of Rights to the United States Constitution and the Bill of Rights of those states which have copied the United States Constitution are fundamentally not a statement of law but rather a statement of morals—a statement of the natural law of man, and wherever there is a violation, in the mind of men, of what is fundamentally right, there is also a discernible violation of the provisions of the Bill of Rights.

On the question of a class action, the Complaint asks that the action be considered as a class action as to plaintiffs and as to defendants. For general authority on this matter, we refer the Court to 39 Am. Jur. 919 and to 28 Am. Jur. Par. 260, Defendants.

[fol. 66] ORDER

Plaintiff's Motion to Amend having been filed prior to June 21, 1961, therefore, in accordance with the stiuplation of the parties,

IT IS HEREBY ORDERED that the plaintiff's Complaint is amended as moved for in plaintiff's Motion to Amend.

DONE IN OPEN COURT THIS —— DAY OF JUNE, 1961.

Judge of the Superior Court

Copy of the Motion to Amend and Order
mailed this 20th day of June, 1961, to:

ROBERT PICKRELL
Attorney General of the State of Arizona
The Capitol Building
Phoenix, Arizona
Attn: Clark Kennedy, esq.

HARRY ACKERMAN
County Attorney of Pima County
Tucson, Arizona
Pima County Court House

(FILED: July 13, 1961.)

[fol. 67]

STIPULATION OF FACTS—filed July 13, 1961

IT IS AGREED that a contract was entered into on the 24th day of April, 1961, in the City of Tucson, County of Pima, and State of Arizona, by and between BARBARA ELFBRANDT and IMOGENE R. RUSSELL, L. E. BOOL and MARTHA L. ELLIOTT, duly elected members of and acting on behalf of the Board of Trustees of Amphitheater Elementary School District No. 10, Pima County, State of Arizona; said BARBARA ELFBRANDT became and is employed by the Amphitheater Elementary School District No. 10 as a teacher, for the period commencing August 31, 1961, through June 7, 1962.

IT IS FURTHER AGREED that the said BARBARA ELFBRANDT was and is a continuing teacher within the meaning of Sections 15-251 and 15-252 A.R.S. 1956, as amended, of the Arizona Revised Statutes, during all times pertinent to the instant litigation and is a person covered within the meaning of the provisions of A.R.S. 38-231, 1956, as amended, and subject to the provisions of that act.

[fol. 68] BARBARA ELFBRANDT refused and will continue to refuse to affirm or swear to the oath set forth in 38-231, A.R.S. 1956, as amended.

IT IS FURTHER AGREED that the named defendants herein will obey and carry out the express requirements of 38-231 A.R.S. 1956, as amended, as they may apply to these plaintiffs and all others similarly situated.

IT IS FURTHER AGREED that the provisions of this act, as they apply to the class of plaintiffs denominated herein, affect the present employment opportunities of such plaintiffs and all other persons who may become employees of the defendants. The defendants contemplate the hiring of numerous and sundry other persons and are at the time of this agreed statement of facts engaged in entering into contractual relationships with this class of plaintiffs and will continue to enter into such contractual

relation with other persons similarly situated to the plaintiffs.

DATED this —— day of ————, 1961.

APPROVED AND STIPULATED TO BY:

[fol. 69]

ROBERT W. PICKRELL
Attorney General
State of Arizona

By /s/ William C. Kennedy
Date: June 27, 1961

HARRY ACKERMAN
County Attorney
State of Arizona

By /s/ Harry Ackerman
Date: June 29, 1961

W. EDWARD MORGAN
Attorney for Plaintiff

By /s/ W. Edward Morgan
Date: June 29, 1961

[fol. 70]

DESIGNATION OF RECORD—filed July 21, 1961

[omitted in printing]

[fol. 71] MINUTE ENTRIES

June 16, 1961:

Timothy J. Mahoney, Judge.

IT IS ORDERED that the prayer requesting that the temporary restraining order be made permanent pendente lite is hereby denied.

June 30, 1961:—Judgment

Timothy J. Mahoney, Judge.

This matter having been submitted upon a stipulation of facts and the Court being advised in the premises does find that Section 38-321, A.R.S., and Section 38-231 as amended, Laws of 1961, Chapter 108, Section 5, is constitutional in all respects, and the Clerk is hereby directed to enter judgment in favor of the defendants and against the plaintiff on her Complaint.

July 12 1961:

Lee Garrett, Judge.

IT IS ORDERED that the Clerk of the Superior Court transmit the original papers and portions of record constituting the record on appeal to the Supreme Court in lieu of carbon copies of same, and request that same be [fol. 72] returned to the office of the Clerk of the Superior Court when the Supreme Court has arrived at its decision in the matter.

* * * *

CLERK'S CERTIFICATE ON MINUTES

[omitted in printing]

[fol. 73]

IN THE SUPREME COURT
OF THE STATE OF ARIZONA

En Banc

No. 7406

BARBARA ELFBRANDT, for herself and others similarly situated, APPELLANTS

v.

IMOGENE R. RUSSELL, L. E. BOOL and MARTHA L. ELLIOTT, members of the Board of Trustees of Amphitheater Elementary School District No. 10, Pima County, State of Arizona; PAUL J. FANNIN, Governor of the State of Arizona; ROBERT W. PICKRELL, Attorney General of the State of Arizona; JEWEL W. JORDAN, State Auditor; LYNN M. LANEY, O. D. MILLER, SAMUEL H. MORRIS, JOHN G. BABBITT, ELWOOD W. BRADFORD, VIVIAN LAYTI BOYSEN, GEORGE W. CHAMBERS, and LEON LEVY, members of the Board of Regents; W. W. DICK, State Superintendent of Public Instruction, and PAUL J. FANNIN, Governor, ex-officio members of the Board of Regents; FLORENCE REECE, Pima County Superintendent of Schools; ROBERT D. MORROW, Superintendent of Tucson School District #1; JACOB C. FRUCHTHENDLER, DELBERT L. SECRIST, NAN LYONS, NORVAL W. JASPER and WILLIAM J. PISTOR, School Board, Tucson District #1; RICHARD A. HARVILL, President of The University of Arizona, APPELLEES

Appeal from the Superior Court of Pima County
The Honorable T. J. Mahoney, Judge

Judgment Affirmed

Morgan & Rosenberg, Tucson
Attorneys for Appellant

Robert W. Pickrell, The Attorney General,
Philip M. Haggerty, Assistant Attorney General
and Harry Ackerman, Pima County Attorney
Attorneys for Appellees

OPINION—May 1, 1963

STRUCKMEYER, Justice.

Appellant as a teacher in the Arizona Public School System at Tucson is required by A.R.S. § 38-231 and § 38-233 as amended by Chapter 108, Laws of 1961 to subscribe to the oath required of all public officers and employees [See Appendix]. This she has refused to do. She [fol. 74] brings this action for herself and for others similarly situated seeking a declaration that the Arizona Officers and Employees Loyalty Oath deprives her of rights guaranteed under the state and federal constitutions. The cause was submitted to the lower court on stipulated facts and the appeal is from its judgment holding the challenged portions of the amended statutes constitutional.

From the time of this State's inclusion as a territory in 1863 every public officer as a condition of employment and before entering upon the duties of his office has been required to take and subscribe to an oath differing but slightly from that now specified in A.R.S. § 38-231. The territorial oath was in this language:

> "I, ————————, do solemnly swear that I will support the Constitution of the United States and the laws of this Territory; that I will true faith and allegiance bear to the same, and defend them against all enemies whatsoever, and that I will faithfully and impartially discharge the duties of the office of (name of office) according to the best of my abilities, so help me God." Chapter XXV Sec. 4, Howell's Arizona Code, 1864.

We pause here only to note that because the Arizona Declaration of Rights, Art. 2, § 7, Constitution of Arizona permits public officers and employees to either swear or affirm in a manner most consistent with and binding upon the conscience of the person, the compulsive subscription does not impinge on religious or conscientious scruples.

As a generality, it can be said that qualifications for public officers and employees of the state may be fixed by the legislature where not otherwise prescribed by the State

Constitution. McCarthy v. State, 55 Ariz. 328, 101 P.2d 449; Campbell v. Hunt, 18 Ariz. 442, 162 P.2d 882. The power to prescribe qualifications of public officers and em- [fol. 75] ployees is essential to the independence of the states and to their peace and tranquility and should be free from external interference unless conflicting with the Constitution of the United States. Taylor v. Beckham, 178 U.S. 548, 44 L.Ed. 1187, 20 S.Ct.890. Where there are suitable reasons, positions of public importance may be denied to groups of persons identified by their particular interests. Board of Governors of Federal Reserve System v. Agnew, 329 U.S. 441, 91 L.Ed. 408, 67 S.Ct. 411. We do not doubt that the legislature in order to preserve the integrity of the public service and safeguard it from disloyalty may enact statutes designed to reasonably attain those ends. Loyalty may be a prescribed qualification for the holding of public employment. Adler v. Board of Education, 342 U.S. 485, 96 L.Ed. 517, 72 S.Ct. 380, 27 A.L.R.2d 472.

Under constitutional government oaths similar in context to that here have been considered as an appropriate means to bind the individual. As has often been pointed out the President of the United States is required to take this oath or affirmation:

> "I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my ability, preserve, protect and defend the Constitution of the United States." Constitution of the United States, Art. 2, Sec. 1.

For centuries the oath was a pledge of fealty to the king. It does "not increase the civil obligation to loyalty; it only strengthens the *social* tie by uniting it with that of *religion*" 1 Blackstone's Commentaries (16th Ed.) 369. It is considered as an expression of devotion to the government, an express engagement of that which every citizen owes to his country, Imbrie v. Marsh, 5 N.J. Super. 239, 68 A.2d 761; Affirmed 3 N.J. 578, 71 A.2d 352, 18 A.L.R.2d 241; for as stated by Justice Story in 1838:

[fol. 76] "Oaths have a solemn obligation upon the minds of all reflecting men, and especially upon those who feel a deep sense of accountability to a Supreme Being." 2 Story, Commentaries on the Constitution of the United States (5th ed.) 613, § 1844.

As such it is an appeal to God to witness the truth of what is declared and an imprecation of divine punishment if what is said is false. See 18 A.L.R.2d 268.

We find nothing within the express language of the oath to which all may not conscientiously and with devotion to the government subscribe.

There is, however, incorporated within the oath a promise that the public officer or employee is not presently engaged in and in the future will refrain from certain conduct.

> "Any officer or employee * * * having taken the * * * oath or affirmation * * * knowingly or wilfully at the time of subscribing * * * or * * * thereafter during his term of office * * * does commit or aid in the commission of any act to overthrow by force or violence the government of this state or * * * advocates the overthrow by force or violence * * * or becomes * * * a member of the communist party * * * or its successors or any of its subordinate organizations * * * having for one of its purposes the overthrow by force or violence of the government of the state of Arizona * * * shall be guilty of a felony and upon conviction * * * subject to all the penalties for perjury; * * *." § 38-231 E.

The legislature has recognized that it is not to everyone the taking of an oath bears a deep sense of accountability to a supreme being and therefore has provided more worldly penalties to compel adherence. It has in effect said that the doing of the proscribed acts constitutes a failure to support the constitution and the laws of the state and to defend them against their enemies. When confronted with the problem of the state's interest in se-[fol. 77] curity, santions may be supplied to coerce and deter its enemies from seeking or holding public employment. Garner v. Board of Public Works of Los Angeles,

341 U.S. 716, 95 L.Ed. 1317, 71 S.Ct. 909. The state may demand an oath of a person seeking public office that he is not engaged in the commission of any act to overthrow by force or violence the government of the state or any of its political subdivisions. Gerende v. Board of Supervisors of Elections of Baltimore, 341 U.S. 56, 95 L.Ed. 745, 71 S.Ct. 565.

What we have said here would ordinarily dispose of this action for we do not entertain attacks on the constitutionality of a statute by those whose rights have not in some way been actually or injuriously affected or directly involved, Gherna v. State, 16 Ar. 344, 146 P. 494, Anno. Cas. 1916 D 94. But in this instance we recognize the problem to appellant is one of potential deterence of constitutionally protected conduct. The compulsion of the oath weighs most heavily on those whose scruples are the most sensitive. See Cramp v. Board of Public Instruction, 368 U.S. 278, 7 L.Ed.2d 285, 82 S.Ct.275. Accordingly, we reach the constitutional questions raised, but neither expressly nor by implication do we pass judgment upon Section 4 of Chapter 108 considering that the mere existence of a criminal statute is not such a threat as to present a justiciable controversy. cf. Hitchcock v. Kloman, 196 Md. 351, 76 A.2d 582.

The attacks directed against this oath question nearly every conceivable constitutional aspect. Not all merit serious consideration. For example, there is here no indiscriminate classification of innocence with knowing ac- [fol. 78] tivity as was found offensive in Wieman v. Updegraff, 344 U.S. 183, 97 L.Ed. 216, 73 S.Ct. 215. Consistent with our interpretation, in part stated hereafter, it does not have the unconstitutional vice of vagueness and indefiniteness in placing an accused on trial for an offense, the nature of which he is given no fair warning, for punishment is restricted to specified acts knowingly and wilfully committed. cf. American Communications Assn. v. Douds, 339 U.S. 382, 413, 94 L.Ed. 925, 70 S.Ct. 647.

It does not violate any rights protected by the Fifth, and Sixth Amendments to the Constitution of the United States for neither are there penalties imposed for past activities nor is appellant required to divulge her past

activities or associations. Ullman v. United States, 350 U.S. 422, 100 L.Ed. 511, 76 S.Ct. 497, 53 A.L.R.2d 1008. The Act is not a Bill of Attainder imposing punishment without conviction in the course of judicial proceedings. Here a person who has in the past engaged in the prohibited conduct can escape punishment by altering the course of his present activities. cf. Communist Party v. Subversive Activities Control Board, 367 U.S. 1, 6 L.Ed. 2d 625, 81 S.Ct. 1357.

Since the oath to which appellant has refused to subscribe has had reproduced upon it all of § 38-231, she has been clearly warned of the consequences of her refusal. There is not here a want of substantive due process. cf. In re Anastaplo, 366 U.S. 82, 6 L.Ed.2d 135, 81 S.Ct. 978. While § 38-233, requires that the oath be filed of record, it does not contemplate that the filing be rejected by the public officer in charge of the board or agency with which the filing is required. There is, hence, no [fol. 79] denial of procedural due process. cf. Speiser v. Randall, 357 U.S. 513, 2 L.Ed.2d 1460, 78 S.Ct. 1332.

We assume that the legislature was not unaware of the decisions of the Supreme Court of the United States and therefore used the word "advocate" as meaning concrete action for forceful overthrow of the government rather than principles divorced from action. Scales v. United States, 367 U.S. 203, 6 L.Ed.2d 782, 81 S.Ct. 1469; Yates v. United States, 354 U.S. 298, 1 L.Ed. 2d 1356, 77 S.Ct. 1064; Dennis v. United States, 341 U.S. 494, 95 L. Ed. 1137, 71 S.Ct. 857.

The most troublesome question to be settled is the collision arising between individual liberties protected by the First Amendment to the Constitution of the United States and the use of the police power of the state seeking to protect its citizens from potential calamity. On this issue some general observations point up the conclusions reached.

The police power of the state is the power vested in its legislature to make, ordain and establish all manner of wholesome and reasonable laws, statutes, and ordinances either with penalties or without as shall be judged to be good and for the wefare of the state and its residents.

Sweet v. Rechel, 159 U.S. 380, 40 L.Ed. 188, 16 S.Ct. 43. It is the authority which resides in every sovereignty to pass all laws for the internal regulation and government of the state. Mutual Loan Co. v. Martell, 222 U.S. 225, 56 L.Ed. 175, 32 S.Ct. 74, Anno. Cas. 1913 B 529. While the police power is the most essential and insistent power of government, rights recured or protected by the United [fol. 80] States Constitution can not, of course, be overthrown or impaired by its exercise, Connolly v. Union Sewer Pipe Co., 184 U.S. 540, 46 L.Ed. 679, 22 S.Ct. 431. Still,

> "* * * Many laws which it would be vain to ask the court to overthrow could be shown, easily enough, to transgress a scholastic interpretation of one or another of the great guaranties in the Bill of Rights." Justice Holmes in Noble State Bank v. Haskell, 219 U.S. 104, 55 L.Ed. 112, 31 S.Ct. 186, 32 L.R.A. [N.S.] 1062, Anno. Cas. 1912 A 487.

The command of the First Amendment requires that speech be fought with speech and falsehoods and facllacies be exposed, not suppressed, unless there is insufficient time to avert the evil consequences of noxious doctrines by argument and education. American Communications Assn. v. Douds, supra. It is too well settled for argument that the right or privilege of free speech has its limitations. Stromberg v. California, 283 U.S. 359, 75 L.Ed. 1117, 51 S.Ct. 532, 73 A.L.R. 1484. As has been pointedly observed, constitutionally protected freedom of speech is narrower than an unlimited license to talk.

In Dennis v. United States, supra, the test for determining acceptable limitations on free speech was stated as being that the decision must be based upon "whether the gravity of the evil, discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger." A somewhat different approach was used in the later case of Konigsberg v. State Bar of California, 366 U.S. 36, 6 L.Ed.2d 105, 81 S.Ct. 997:

> "On the one hand, certain forms of speech, or speech in certain contexts, has been considered outside the scope of constitutional protection. See, e.g., Schenck

v. United States, 249 U.S. 47, 63 L.Ed. 470, 39 S.Ct. 247; Chaplinsky v. State of New Hampshire, 315 U.S. 568, 86 L.Ed. 1031, 62 S.Ct. 766; Dennis v. United States, 341 U.S. 494, 95 L.Ed. 1137, 71 S.Ct. 857; Beauharnais v. People of State of Illinois, 343 [fol. 81] U.S. 250, 96 L.Ed. 919, 72 S.Ct. 725; Yates v. United States, 354 U.S. 298, 1 L.Ed. 2d 1356, 77 S.Ct. 1064; Roth v. United States, 354 U.S. 476, 1 L.Ed.2d 1498, 77 S.Ct. 1304. On the other hand, general regulatory statutes, not intended to control the content of speech but incidently limiting its unfettered exercise, have not been regarded as the type of law the First or Fourteenth Amendment forbade Congress or the States to pass, when they have been found justified by subordinating valid governmental interests, a prerequisite to constitutionality which has necessarily involved a weighing of the governmental interest involved. * * *"

We recognize the prohibited conduct in denying membership in the enumerated organizations diminishes the individual's freedom of association and hence the unfettered communication of ideas, but whatever test be applied, constitutional restraints are satisfied. The conduct sacrificed to governmental interests only minimally and incidentally conflicts with the First Amendment. The gravity of the evil sought to be reached, discounted by its improbability, justifies the invasion.

In considering the amended statutes we are conscious of the principle that courts are not concerned with the wisdom of legislation. Bohannan v. Corporation Commission, 82 Ariz. 299, 313 P.2d 379. Nor is it within our province to decide the propriety or expediency of the law. These are matters for the legislature's determination. We look to discover whether there is a basic for the enactments, Schrey v. Allison Steel Mfg. Co., 75 Ariz, 282, 255 P.2d 604 consistent with the scope of the First Amendment.

The State, an integral part of the nation, has enemies capable of nearly instantaneous devastation, the sworn foe of republican government and all democratic processes [fol. 82] who have publicly vowed to "bury" us. Only the want of an opportune time defers the moment of the

thermonuclear first strike. Self-preservation makes it the concern of all and the particular duty of public employees to be alert against internal weakening of the state government. It is to be observed that public officials and employees as the normal leaders in community affairs are sensitive to and the target of proselytization. Their possible failure in the performance of duties can but be attendant with the gravest consequences. The state's interest demands that public employees refrain from associations out of which even unconscious corruption may comfort those who seek world domination. Even memberships in the forbidden organizations lend the influence of the members' names and offices to all aims and purposes. We need go no further; the evil sought to be restrained is evident.

The language of § 38-231 E as amended has no relationship to beliefs. It prohibits any membership in any organization having for *one* of its purposes the overthrow by force and violence of the government of the State of Arizona or any of its political subdivisions including passive and nominal memberships. cf. Scales v. United States, 367 U.S. 203, 6 L.Ed.2d 782, 81 S.Ct. 1469. It makes criminal after the taking and subscription to the oath all memberships in all organizations engaging in illegal advocacy. There is no imputation that public officers and employees may hold or retain memberships for exclusively lawful purposes. The risk that the insiduous poison may be here spread is not one the people of the state are willing to accept

In arriving at our conclusions we have considered that the legislature has created a new crime, a felony, where [fol. 83] none before existed, one which severely penalizes the formal act of association with certain groups. The critical act forbidden is the knowing or wilfull joining or remaining a member of an organization with knowledge of the illegal purpose. The memberships contemplated by the statute obviously must be determined not by conduct from which an inference may be drawn but by objective acts of joining and acceptance as members. cf. Killian v. United States, 368 U.S. 231, 7 L.Ed.2d 256, 82 S.Ct. 302. No other interpretation is consistent with the spirit of the act.

The legislative has declared by § 38-231 E that an officer or employee shall not be entitled to compensation unless and until such officer or employee does take and subscribe to the form of oath. We construe the legislative intent as purely regulatory, meaning that when a proper affidavit is filed compensation shall be paid in full for past services.

The judgment of the court below is affirmed.

FRED C. STRUCKMEYER, JR., Justice

CONCURRING:

JESSE A. UDALL, Vice Chief Justice

LORNA E. LOCKWOOD, Justice

[fol. 84]

BERNSTEIN, Chief Justice (Specially Concurring)

I agree with the following propositions developed in the majority opinion: 1. Loyalty to the state may be a prescribed qualification for the holding of a public office or of public employment. 2. The legislature may provide criminal sanctions to prohibit and deter enemies of the state from seeking or holding public employment. 3. The legislature has the power to proscribe subversive speech or conduct as well as the knowing or wilful joining or remaining a member of an organization which has for one of its purposes the overthrow of the government by force

or violence with knowledge of such illegal purpose. 4. The restriction of the first amendment freedoms of speech and association resulting from such legislation is justified by the clear and present danger which subversion poses to the survival of our free way of life. Furthermore, I agree that, subject to the limitations which I will point out, a loyalty oath may be made a part of the legislative scheme to determine and insure the loyalty of state officers and employees. Thus, my concern is not with *whether* the state can act to supress disloyal conduct and speech, and to eliminate disloyal employees, but with *how* it may act to accomplish these ends.

It is axiomatic that in all of its legislative endeavors, a state must act with due process of law. I do not believe the plaintiff's contention that procedural due process is denied her can be fairly dismissed, as in the majority opinion, with the statement that there is no denial of procedural due process, since the statute does not permit the official with whom the oath is filed to reject it. Speiser [fol. 85] v. Randall, 357 U.S. 513, 78 S.Ct. 1332, 2 L.Ed. 2d 1460 (1958), cited by the majority, does not purport to define the outer limits of procedural due process.

One of the contentions of the plaintiff is that this legislation is unconstitutional because it fails to provide a hearing at which her refusal to take the oath may be explained. The majority opinion leaves the arguments of the plaintiff unanswered.[1] In my view, this contention raises the most serious issue in this appeal.

The plaintiff has a constitutional right not to be excluded from public employment for an arbitrary or discriminatory reason, Wieman v. Updegraf, 344 U.S. 183, 192, 73 S.Ct. 215, 97 L.Ed. 216 (1952) or an unconstitutional reason, Cramp v. Board of Public Instruction, 368 U.S. 278, 82 S.Ct. 275, 7 L.Ed. 2d 285 (1962). A legitimate reason for her exclusion from public employ-

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[1] The U.S. Supreme Court has never ruled on this issue but has indicated its concern with it, Nostrand v. Little, 362 U.S. 474, 80 S.Ct. 840, 4 L.Ed. 2d 892 (1960); Nostrand v. Little, 368 U.S. 436, 82 S.Ct. 464, 7 L.Ed. 2d 426 (1962). See also Nostrand v. Little, 58 Wash. 2d 111, 361 P.2d 551 (1961).

ment,[2] and the reason which provides the police power justification for this legislation, is the elimination of disloyal persons from critical and sensitive positions in our public schools, Adler v. Board of Public Education, 342 [fol. 86] U.S. 485, 72 S. Ct. 380, 96 L.Ed. 517 (1952). If however, her exclusion is based not upon a showing of disloyalty, but upon grounds of religion or conscience, she is excluded for arbitrary and discriminatory reasons—reasons which are not justified bases for the exercise of the police power. Thus, the critical question seems to me to be: Can the state, in pursuing the legitimate goal of eliminating disloyal persons from public employment, choose a method which in practical effect also eliminates those who are not shown to be disloyal?

The plaintiff, in a memorandum submitted in the lower court, has stated that her reason for refusing to take the oath is that she feels it conflicts with the moral philosophy taught by her religion. She states she cannot make either an oath or affirmation without violating her religious conscience.

Certainly the plaintiff may not claim exemption from every form of oath on grounds of conscience. The requirement of some oaths is written into the Constitution itself, and so established, transcends all questions of due process, U.S. Const. Art. VI, § 3. Cf. Arizona Const. Art. VI, § 27.

> "Clearly the constitution permits the requirement of oaths by office holders to uphold the constitution itself. The obvious implication is that those unwilling to take such an oath are to be barred from public office. For the President, a specific oath was set forth in the constitution itself. Art. II § 1. And congress has detailed an oath for other federal officers. Ob-

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[2] The legislature has chosen a curious method of enforcement of the oath requirement which permits those who refuse to take the oath to continue in their positions without pay. Dedicated subversives who may be supported by their organizations can continue their nefarious work in sensitive positions of public employment. For those unsubsidized persons who object to the oath for reasons of conscience, termination of pay is tantamount to discharge from employment, and must be so considered.

viously the Framers of the Constution thought that the exaction of an affirmation of minimal loyalty to the Government was worth the price of whatever deprivation of individual freedom of conscience was involved . . . ." American Communications Ass'n v. Douds, 339 U.S. 382, 415, 70 S.Ct. 674, 94 L.Ed. 925 (1950)

[fol. 87] If there was involved here only the express oath of A.R.S. § 38-231 G, an oath which the plaintiff appears to have subscribed without complaint prior to the 1961 embellishments, I would say it was merely an affirmation of minimal loyalty which may be required under constitutional precedent. But the 1961 oath has much greater significance than its predecessor, although the express wording is virtually unchanged. It is now inextricably interwoven with the criminal provisions of A.R.S. § 38-231 E. If the oath taker is already engaged in the activities proscribed by subsection E, taking the oath is the act that makes her a criminal. If she engages in these activities after she takes the oath she is guilty of this crime because she has taken the oath. Moreover, the act requires that the criminal provisions be conjoined with the oath form that must be signed. The majority opinion realistically characterizes the relationship between certain provisions, as would be the case if, for example, the criterion "promise that the public officer or employee is not presently engaged in and in the future will refrain from certain conduct."

This is not to suggest that the state cannot create the crime defined in A.R.S. § 38-231 E., or that it cannot make this crime applicable only to state officers and employees. As they have been interpreted in the majority opinion, the criminal provisions of the act may be a valid exercise of the police power. Furthermore, if the criminal provisions were completely divorced from the oath provisions, as would be the case if, for example, the criterion of the class to which they applied was defined to be "all state officers and employees," the oath would remain a simple affirmation of minimal loyalty. My point is this: In making the oath the element without which there can be [fol. 88] no criminal offense, and in requiring that each

officer and employee perform this elements of the offense as a condition of public employment, the legislature has removed the oath from that class of affirmations of minimal loyalty which may be required without regard to discrimintory effect.[3] Now the standards of due process must be satisfied.

Most Americans take a loyalty oath with a feeling of patriotic pride and satisfaction. Nevertheless, there are those whose loyalty is unquestioned who, in sincere conscientious conviction refuse to subscribe to such oaths. For some, the objection is grounded in relgious beliefs,[4] for

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[3] That even the simplest of oaths of loyalty may operate in a discriminatory manner cannot be denied. The man whose religious beliefs preclude him from taking any oath or affirmation of loyalty to a sovereign other than God, or who takes literally the scriptural admonition: "Swear not at all, neither by heaven; for it is God's throne, Nor by the earth; for it is his footstool: * * * But let your communication be Yea, yea, Nay, nay; for whatsoever is more than these cometh of evil." (Matt. 5:34-35, 37.) though he be preeminently qualified in all other respects, cannot qualify to be President of this nation, U.S. Const. Art. II, § 1, nor judge of this court, Ariz. Const. Art. VI, § 27, nor serve in other federal or state offices, U.S. Const. Art. VI, § 3. He is excluded because of his religious beliefs, a type of discrimination which would be condemned by due process principles if the requirement of these simple oaths was not written into the Constitutions under which our nation and state were organized.

[4] See, e.g. the following statements of two public employees who refused to take a Pennsylvania loyalty oath similar in tenor to that now before us:

> "I am by conviction, a Christian pacifist and am therefore opposed to the use of violent means for the achievement of any end, no matter how righteous. Certainly not for the overthrow of our Government which I love and cherish. I could therefore with perfect truthfulness take this oath. My objection to the Oath is that I feel its effect will be to curb freedom of thought and expression: a curb which we expect in communist countries but which is directly contrary to the spirit and practice of Democracy. During the long legislative struggle over this Bill, many teachers have been afraid to voice their opposition to it for fear of being suspected of subversion. This forcibly illustrates to me the fact that the Bill is producing, among many, a timid conformity instead of the free thinking and discussion on which the stability and progress of our nation

[fol. 89] others upon the concepts of academic or intellectual freedom.[5] There are undoubtedly other reasons for refusal to take the oath. However much we may disagree with the logic or reasonableness of these obejctions, we must admit that they do not prove disloyalty.

[fol. 90] If, under this legislation there were no opportunity for those coming within its provisions to explain their refusal to take the oath, it would operate with equal vigor to eliminate the disloyal and the con-

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rests . . . . for these reasons I cannot conscientiously support this Act. . . ."

Similarly:

"That the actual words of the Pennsylvania Loyalty Oath are relatively innocuous is a tribute to the resistance of a free people and their representatives against coercive forces that would cast our very thoughts in a mold of conformity, mechanization and violence. In spirit, however, the Oath is one of several instruments by which we are being 'persuaded' that totalitarian regimentation must be met by totalitarian, 100 per cent 'Americanism'. In a day when the impulse to conform, to acquiesce, to go along, is the instrument used in subjecting men to dictatorial rule throughout the world, non-conformity—with a religious motivation—becomes a means of preserving the dignity of man. Although I am neither communist nor subversive, I must say 'No' to the spirit of the Oath. Through the years Quakers have continuously declared loyalty of citizenship, but the superficial and unreal implication that we have only to close our minds to Communism in order to save America is false and dangerous." Byse, Report on Pennsylvania Loyalty Act, 101 U.Pa. L.Rev. 480, Note 5 (1953).

[5] See Mr. Justice Douglas' dissenting opinion in Adler v. Board of Education, 342 U.S. 485, 508, 72 S.Ct. 380, 96 L.Ed. 517 (1952) which contains a forceful argument for academic freedom. And cf. the October 17, 1962 Associated Press report of President Kennedy's comments when he signed into law a bill removing the requirement of a disclaimer affidavit (loyalty oath) from the National Science Foundation and National Defense Education Acts. The President stated he was glad to sign the law, and noted that 32 colleges and universities had refused to participate in the programs because of the disclaimer provisions. He was quoted: "It is highly unlikely that the affidavit requirement kept any communist out of the programs. . . . It did, however, keep out those who considered the disclaimer a bridle upon freedom of thought." *Arizona Republic* Oct. 18, 1962.

scientious. But there has been no suggestion that the national security is in clear and present danger from those of unbending religious conscience or from champions of academic freedom. We must remember that the sole police power justification for this legislation is to eliminate disloyal persons from public office and employment.

Viewed in another way, an oath requirement without provision for a hearing would create an irrebutable presumption that one who refuses to take the oath is disloyal. Refusal to take the oath would be a conclusive ground of disqualification from public employment, yet the only qualification which is established by the act is loyalty. A statute which operates to deny a fair opportunity to rebut the presumption raised by its provisions is offensive to due process, Manley v. State of Georgia, 279 U.S. 1, 49 S.Ct. 215, 73 L.Ed. 575 (1928); City of Seattle v. Ross, 54 Wash. 2d 655, 344 P.2d 216 (1959); People v. Wells, 33 Cal. 2d 330, 202 P.2d 53 (1949); See State v. Childress, 78 Ariz. 1, 274 P.2d 333 (1954).

In Adler v. Board of Education, 342 U.S. 485, 72 S.Ct. 380, 96 L.Ed. 517 (1952), a statute made membership in organizations listed as subversive prima facie evidence of disqualification for employment as a teacher. The Supreme Court said:

> "Membership in a listed organization found to be within the statute * * * is a legislative finding that the member by his membership supports the thing the organization stands for, namely, the overthrow of government by unlawful means. We cannot say [fol. 91] that such a finding is contrary to fact or that 'generality of experience' points to a different conclusion. Disqualification follows therefore as a reasonable presumption from such membership and support. *Nor is there here a problem of procedural due process. The presumption is not conclusive but arises only in a hearing where the person against whom it may arise has full opportunity to rebut it.* * * * Thus the phrase 'prima facie evidence of disqualification' as used in the statute imports a hearing at which one who seeks appointment to or retention in a public school position shall be afforded an opportunity to

present substantial evidence contrary to the presumption. * * *" 342 U.S. at 494, 495. (Emphasis added.)

If *membership in a subversive organization* cannot create a conclusive presumption of disqualification for public employment, much less can refusal to sign this loyalty oath be made conclusive grounds for disqualification.

The refusal to speak cases are also instructive on this issue. In Slochower v. Board of Education, 350 U.S. 551, 76 S.Ct. 637, 100 L.Ed. 692 (1956), the Supreme Court was faced with a provision of the charter of the City of New York which made a public employee's invocation of the self-incrimination privilege in an investigation dealing with his official conduct grounds for termination of the employment. The court held the provision invalid because, "in practical effect the questions asked are taken as confessed and made the basis of the discharge," 350 U.S. at 558. Thus, refusal to speak cannot be taken as presumptive evidence of guilt of the acts inquired into. In three cases in which the Supreme Court upheld discharge of public employees because of their refusal to answer questions concerning possible subversive associations, the court was careful to emphasize, in each case, that dismissal was based not upon an unpermitted inference of guilt arising from the refusal to answer, but upon other grounds, Beilan v. Board of Education, 357 U.S. [fol. 92] 399, 78 S.Ct. 1317, 2 L.Ed. 2d 1414 (1958) (dismissal upon statutory ground of incompetence as broadly interpreted by state court); Lerner v. Casey, 357 U.S. 468, 78 S.Ct. 1311, 2 L.Ed. 2d 1423 (1958) (dismissal for "doubtful trust and reliability" and "lack of candor"); Nelson v. County of Los Angeles, 362 U.S. 1, 80 S.Ct. 527, 4 L.Ed. 2d 494 (1960) (dismissal based upon a statutory ground of "insubordination"). In the present case, refusal to sign the oath is the basis of the unpermitted inference of guilt (i.e. disloyalty).[6]

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[6] While we need not here decide whether the legislature could require the discharge of those who refuse to take an oath on the basis of "insubordination," there is in my mind a significant difference between discharging an employee for failure to disclose information relevant to his qualifications for employment, as in the

For these reasons, while the legislature may utilize an oath to determine the loyalty of persons in public employment, it may not, in a loyalty requirement such as this, make refusal to take the oath a conclusive basis for exclusion from public employment. Those who refuse to take the oath for reasons other than disloyalty must be given an opportunity to explain their refusal. The burden remains with the state to prove the disloyalty of those excluded from public employment, cf. Speiser v. Randall, supra.

We recently indicated that a legislative act providing for the suspension of automobile registrations and driver's licenses under specified conditions, would be unconsti- [fol. 93] tutional unless a hearing would be granted, if sought, in which the factual determination of those specified conditions would be made, Schecter v. Killingsworth, —— Ariz. ——, —— P.2d —— (1963) [No. 7533]. A right not to be discriminately discharged from public employment is as important and as protected a right as the right to drive on the public highway. Here too, the factual determination of the condition which justifies discharge, disloyalty, must be made at a hearing if requested.

The plaintiff is a continuing teacher (i.e. one with tenure) within the meaning of A.R.S. § 15-251. She therefore is entitled, if she so requests, to a hearing under A.R.S. § 15-254,[7] before she may be discharged from her

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cases cited, and discharging an employee for his refusal to do an act which is repugnant to his conscience and which, under such circumstances, is not relevant to his qualifications for employment.

[7] "§ 15-254. Hearing on dismissal

Within fifteen days after receipt of notice of dismissal or termination, a continuing teacher may serve upon a member of the school board or the superintendent, a written request for either a public or private hearing before the board. The hearing shall be held by the board not less than ten nor more than fifteen days after the request is served, and notice of the time and place of the hearing shall be given the teacher not less than three days prior to the date of the hearing. At the hearing the teacher may appear in person and by counsel, if desired, and may present any testimony, evidence or statements, either oral or in writing, in his behalf. Within ten days following the hearing the board shall

teaching position,[8] cf. Nostrand v. Little, 58 Wash.2d 111, 361 P.2d 551 (1961). If at such hearing, her explanation of her refusal to take the oath is sufficient to rebut any presumption of disloyalty arising therefrom, and if no additional evidence of disloyalty is adduced by the state, she is, in my opinion, entitled to be reinstated and to re- [fol. 94] ceive any compensation withheld under the provisions of A.R.S. § 38-231.[9] By this construction the constitutionality of this legislation may, in this case, be upheld and the judgment affirmed. Otherwise I would be compelled to dissent on the constitutionality of the statute.

CHARLES C. BERNSTEIN
Chief Justice.

[fol. 95]

JENNINGS, Justice.

I agree with Chief Justice Bernstein that without some provision for a hearing at which the plaintiff can explain her refusal to take the oath, the loyalty oath requirement would be unconstitutional. I am not, however, willing to decide at this point that the tenure hearing provided by A.R.S. § 15-254 is sufficient to preserve the constitutionality of the oath statute. Chief Justice Berstein's view of the availability and scope of the tenure hearing is a minority view on this court, and would remain so even if I were to join him in his interpretation of the tenure

determine whether there existed good and just cause for the notice of dismissal and shall render its decision accordingly, either affirming or withdrawing the notice of dismissal or termination. Good and just cause shall not include religious or political beliefs or affiliations unless in violation of the oath of the teacher."

[8] I consider withholding of compensation tantamount to discharge, supra, note 2.

[9] The record fails to show that the plaintiff has requested a tenure hearing, or that such hearing would not result in full reinstatement and the restoration of compensation withheld.

statutes. Furthermore, the plaintiff has not requested a tenure hearing, and we have heard no argument on the scope and effect of such a hearing.

If the plaintiff is indeed entitled to a hearing under the tenure act, she has not exhausted this administrative remedy. I am therefore of the view that it is inappropriate to finally determine the constitutionality of the oath statute as applied to the plaintiff until she has requested an administrative hearing and the outcome of that request is part of the record upon which our decision can be based.

RENZ L. JENNINGS, Justice

[fol. 96] APPENDIX

A.R.S. § 38-231 and § 38-233
As amended Laws 1961, Ch. 108, § 5 and § 6.

§ 38-231. Officers and employees required to take loyalty oath; form; penalty

A. In order to insure the statewide application of this section on a uniform basis, each board, commission, agency, and independent office of the state, and of any of its political subdivisions, and of any county, city, town, municipal corporation, school district, and public educational institution, shall immediately upon the effective date of this act completely reproduce § 38-231 as set forth herein, to the end that the form of written oath or affirmation required herein shall contain all of the provisions of said section for use by all officers and employees of all boards, commissions, agencies and independent offices.

B. For the purposes of this section, the term officer or employee means by person elected, appointed, or employed, either on a part-time or full-time basis, by the state, or any of its political subdivisions or any county, city, town, municipal corporation, school district, public educational institution, or any board, commission or agency of any of the foregoing.

C. Any officer or employee elected, appointed, or employed prior to the effective date of this act shall not later than ninety days after the effective date of this act take and subscribe the form of oath or affirmation set forth in this section.

D. Any officer or employee within the meaning of this section who fails to take and subscribe the oath or affirmation provided by this section within the time limits prescribed by this section shall not be entitled to any compensation unless and until such officer or employee does so take and subscribe to the form of oath or affirmation set forth in this section.

E. Any officer or employee as defined in this section having taken the form of oath or affirmation prescribed by this section, and knowingly or wilfully at the time of subscribing the oath or affirmation, or at any time thereafter during his term of office or employment does commit or aid in the commission of any act to overthrow by force or violence the government of this state or of any of its political subdivisions, or advocates the overthrow by force or violence of the government of this state or of any of its political subdivisions, or during such term of office or employment knowingly and wilfully becomes or remains a member of the communist party of the United States or its successors or any of its subordinate organizations or any other organization having for one of its purposes the overthrow by force or violence of the government of the state of Arizona or any of its political subdivisions, and said officer or employee as defined in this section prior to becoming or remaining a member of such organization or organizations had knowledge of said unlawful purpose of said organization or organizations, [fol. 97] shall be guilty of a felony and upon conviction thereof shall be subject to all the penalties for perjury; in addition, upon conviction under this section, the officer or employee shall be deemed discharged from said office or employment and shall not be entitled to any additional compensation or any other enoluments or benefits which may have been incident or appurtenant to said office or employment.

F. Any of the persons referred to in Article XVIII, Section 10 of the Arizona Constitution as amended, re-

lated to the employment of aliens, shall be exempted from any compliance with the provisions of this section.

G. In addition to any other form of oath or affirmation specifically provided by law for an officer or employee, before any officer or employee enters upon the duties of his office or employment, he shall take and subscribe the following oath or affirmation:

State of Arizona, County of _____ I, _____
(type or print name)
_____ do solemnly swear (or affirm) that I will support the Constitution of the United States and the Constitution and laws of the State of Arizona; that I will bear true faith and allegiance to the same, and defend them against all enemies, foreign and domestic, and that I will faithfully and impartially discharge the duties of the office of _____(name of office)_____ according to the best of my ability, so help me God (or so I do affirm).

_____
(signature of officer or employee

§ 38-233. Filing oaths of record

A. The official oaths of state elective officers shall be filed of record in the office of the secretary of state. The official oaths of all other state officers and employees shall be filed of record in the office of the employing state board, commission or agency.

B. The official oaths of notaries public and of elective county and elective precinct officers shall be filed or record in the office of the county recorder, except the oath of the recorder, which shall be filed with the clerk of the board of supervisors. The official oaths of all other county and precinct officers and employees shall be filed of record in the office of the employing county or precinct board, commission or agency.

C. The official oaths of all city, town or municipal corporation officers or employees shall be filed of record in the respective office of the employing board, commission or agency of the cities, towns and municipal corporations.

D. The official oaths of all officers and employees of all school districts shall be filed of record in the office of the superintendent of public instructions.

[fol. 98] E. The official oaths of all officers and employees of each public educational institution except school districts shall be filed of record in the respective offices of said public educational institutions.

F. The official oath or affirmation required to be filed of record shall be maintained as a permanent official record.

[fol. 99]

IN THE SUPREME COURT
OF THE STATE OF ARIZONA

No. 7406

[Title Omitted]

MOTION FOR REHEARING—Submitted May 15, 1963

Come now the Appellants and move the Court for rehearing in the above-entitled matter for the reasons and upon the grounds hereinafter set forth.

I

For the purposes of this Motion for Rehearing, the Appellants reiterate each and every matter set forth in their opening brief heretofore filed in the above-entitled action.

II

It is respectfully submitted that the majority opinion of this Court, in its analysis of the statute in question and the case of *Killian* vs. *U.S.*, 368 U.S. 231, makes clear the most invidious force of the statute. If counsel understands the majority's opinion, the mere membership in any of the proscribed organizations might be so contaminating and so dangerous to the public employees that the legislative intent to forbid such membership to all public employees of the State becomes apparent. The instructions on membership approved in the decision on *Killian*

vs. *U.S.*, Supra, are predicated upon the subjective tests of membership, and the jury was instructed that it could find a party guilty from what in effect would be a group of isolated acts, if those isolated acts the jury believed showed a subjective intent to be a member. Thus the Legislature of the State of Arizona has put the burden upon any public employee that not only may he not be-
[fol. 100] come a member of any proscribed organization but he may not in effect act in such a parallel way or have friends or acquaintances who, in connection with his parallel activities, might be affiliated with a proscribed organization; for if he does and if he does sign the oath, he places himself in jeopardy of the punishment set forth by the Legislature.

III

Appellants adopt the argument set forth in the opinion of Justice Bernstein: that the statute in question is un-Constitutional in that it does not afford a proper hearing procedure before the determination of whether or not in fact the public employee is subversive. In that regard, the United States Supreme Court decision, dismissing an appeal from the decision of the Supreme Court of the State of Washington, 361 P2d 551, is interesting. As set forth in the briefs of counsel at page 954, 7 Law Ed. U. S. Supreme Court Reports, and in particular the brief filed by the Attorney General and abstracted at page 950:

> "The procedure prescribed in the rules and regulations for the hearing before discharge of a professor is substantially the same as for an accused person in a court of law, except a jury trial. *Nostrand* v. *Little* (Wash)"

It would appear that the United States Supreme Court upheld the validity of the Washington case: *Nostrand* v. *Little*, 368 U.S. 436, 7 L Ed 2d 426, only on the basis that there was in fact a judicial procedure which gave the party substantially the same protections which a defendant in a criminal court proceeding would have, with all of the presumptions and right of counsel and other usual rights of a defendant as to procedural safeguards. Our

point of difference with Justice Bernstein would only be that this case came before the Court and was accepted by the Court as a class action; and the question of whether or not there is a hearing procedure for teachers is not [fol. 101] the sole answer to the attach on the Constitutionality of this statute. The appeal was drawn, briefed and argued on the right of every public employee, whether he be teacher or not. It would therefore seem that by the authority of the *Nostrand* v. *Little*, Supra, decision, the United States Supreme Court has ruled that statutes such as the Washington and Arizona statutes must provide for a fully constituted hearing for all public employees prior to the imposition of any penalty.

IV

Appellants further urge the Court to hold the legislation in question unConstitutional upon the grounds that the statute, by not providing a hearing with Constitutional safeguards and presumptions, is unConstitutional for the reasons that they constitute the taking of property without due process of law. In *Berry* vs. *Koehler*, 369 P 2d 1010, the Supreme Court of Iowa confirmed the great majority of cases ruling that a profession or occupation is such a property right as to be protected under the United States Constitutional provisions against the taking of property without due process of law. Certainly each public employee of the State, whether he be teacher or garbage collector, should not have his livelihood impaired without his "day in court" and the very effect of the prerequisite to payment being the oath taking, with the disclaimer and without the opportunity to explain his conduct, is such a taking of property without due process.

V

On the issue raised in Appellants' opening brief, on the vagueness of the statute involved, subsequent to the filing of said brief, the United States Supreme Court held a Florida statute unConstitutional on just those grounds. *Cramp* v. *Bd. of Public Instructions*, 368 U.S. 278, 7 Law Ed 2d 285.

[fol. 102] It is interesting to note that the United States Supreme Court did not feel that just because the public employee signed the oath with all of the provisions of the statute set out in front of him that this took away in any respect from the charge that the statute was vague and indefinite. The statute is set forth in its entirety in footnote #1 on page 287 of the Lawyers' Edition. Counsel might suggest that merely because a man can read something it does not necessarily mean that he can understand it.

Therefore, for all the reasons set forth in Appellants' Opening Brief and for those reasons reitered and set forth in this Motion for Rehearing, Appellants repectfully request a rehearing before this Court on the issues involved.

Respectfully submitted this 15th day of May, 1963.

W. EDWARD MORGAN
45 West Pennington, Suite 407
Tucson, Arizona
Attorney for Appellants

Copy received this day of May, 1963:

ATTORNEY GENERAL OF THE
STATE OF ARIZONA

By _____

Copy mailed May 16, 1963, to:
PIMA COUNTY ATTORNEY
Pima County Court House
Tucson, Arizona

[fol. 103]

SUPREME COURT
STATE OF ARIZONA
PHOENIX

May 28, 1963

No. 7406

BARBARA ELFBRANDT, for herself and others similarly situated, APPELLANTS

v.

IMOGENE R. RUSSELL, ET AL, APPELLEES

The following action was taken by the Supreme Court of the State of Arizona on May 28, 1963, in regard to the above-entitled cause:

"ORDER: Motion for Rehearing—DENIED."

SYLVIA HAWKINSON, Clerk
By /s/ L. Brooks
Assistant Clerk

To—W. EDWARD MORGAN
45 West Pennington, Suite 407
Tucson, Arizona
Attorney General
Capital Building
Phoenix, Arizona

County Attorney of Pima County
c/o Pima County Courthouse
Tucson, Arizona

[fol. 104]

IN THE SUPREME COURT
OF THE STATE OF ARIZONA

[SEAL]

(Filed Jun. 4, 1963)

To the Honorable the Superior Court of the State of Arizona in and for the County of Pima

GREETING:

Whereas, lately in the Superior Court of the State of Arizona in and for the County of Pima, before you in a cause between

BARBARA ELFBRANDT, for herself
and others similary situated, PLAINTIFFS

vs.

IMOGENE R. RUSSELL, L. E. BOOL, and MARTHA L. ELLIOTT, members of the Board of Trustees of Amphitheater Elementary School District No. 10, Pima County, State of Arizona; PAUL J. FANNIN, Governor of the State of Arizona; ROBERT W. PICKRELL, Attorney General of the State of Arizona; JEWEL W. JORDAN, State Auditor; LYNN M. LANEY, O. D. MILLER, SAMUEL H. MORRIS, JOHN G. BABBITT, ELWOOD W. BRADFORD, VIVIAN LAYTI BOYSEN, GEORGE W. CHAMBERS, and LEON LEVY, members of the Board of Regents; and W. W. DICK, State Superintendent of Public Instruction, and PAUL J. FANNIN, Governor, ex-officio members of the Board of Regents; FLORENCE REECE, Pima County Superintendent of Schools; ROBERT D. MORROW, Superintendent of Tucson School District #1; JACOB C. FRUCHTHENDLER, DELBERT L. SECRIST, NAN LYONS, NORVAL W. JASPER and WILLIAM J. PISTOR, School Board, Tucson District #1; and RICHARD A. HARVILL, President of the University of Arizona, DEFENDANTS

Case No. 68451:

said Superior Court entered its judgment on the 30th day of June, 1961, in favor of the defendants and against the plaintiffs.

[fol. 105] as by the inspection of the record of the said Superior Court, which was brought into the Supreme Court of the State of Arizona by virtue of an appeal by plaintiffs agreeably to the law in such case made and provided fully and at large appears

And Whereas, in May, in the year of our Lord one thousand nine hundred and sixty-two, the said cause came on to be heard before said Supreme Court, and was submitted for decision after argument of counsel.

On Consideration Whereof, it was on the first day of May in the year of our Lord one thousand nine hundred and sixty-three, ordered by this Court that the judgment of the said Superior Court in this cause, appealed from be, and the same is hereby affirmed.

[fol. 106] You therefore are hereby commanded that such proceedings be had in said cause, as according to the decision and order of this Court, and as according to right and justice, and to law, out to be had.

Witness, the Honorable Charles C. Bernstein, Chief Justice of the Supreme Court of the State of Arizona, the Third day of June, in the year of our Lord one thousand nine hundred and sixty-three.

COSTS OF .....

Clerk	$.....
Reporter's Transcript....	$.....
Transcript of Record....	$.....
Abstract of Record.....	$.....
Brief	$.....
	$.....

/s/ Sylvia Hawkinson
Clerk of the Supreme Court
of the State of Arizona

No. 7406

SUPREME COURT
OF THE STATE OF ARIZONA

BARBARA ELFBRANDT, for herself and others similarly situated, APPELLANTS

vs.

IMOGENE R. RUSSELL, L. E. BOOL, and MARTHA L. ELLIOTT, etc. et al., APPELLEES

MANDATE

[fol. 107]

[Clerk's Certificate to foregoing paper omitted in printing.]

[fol. 108]

SUPREME COURT OF THE UNITED STATES

ELFBRANDT ET AL. v. RUSSELL ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ARIZONA

No. 553, Misc. Decided June 15, 1964.

PER CURIAM.

The motion for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted. The judgment is vacated and the case is remanded to the Supreme Court of Arizona for further consideration in light of *Baggett* v. *Bullitt*, No. 220, October Term, 1963, decided June 1, 1964.

[fol. 109]

UNITED STATES OF AMERICA, ss:

THE PRESIDENT OF THE UNITED STATES OF AMERICA

Filed July 14, 1964, Sylvia Hawkinson, Clerk, Supreme Court

[SEAL]

To the Honorable the Judges of the Supreme Court of the State of Arizona,

GREETINGS:

WHEREAS, lately in the Supreme Court of the State of Arizona, there came before you a cause between Barbara Elfbrandt, for herself and others similarly situated, appellants, and Imogene R. Russell, L. E. Bool and Martha L. Elliott, members of the Board of Trustees of Amphitheater Elementary School District No. 10, Pima County, State of Arizona; Paul J. Fannin, Governor of the State of Arizona; Robert W. Pickrell, Attorney General of the State of Arizona; Jewell W. Jordan, State Auditor; Lynn M. Laney, O. D. Miller, Samuel H. Morris, John G. Babbitt, Elwood W. Bradford, Vivian Layti Boysen, George W. Chambers, and Leon Levy, members of the Board of Regents; W. W. Dick, State Superintendent of Public Instruction, and Paul J. Fannin, Governor, ex-officio members of the Board of Regents; Florence Reece, Pima County Superintendent of Schools; Robert D. Morrow, Superintendent of Tucson School District #1; Jacob C. Fruchthendler. Delbert L. Secrist, Nan Lyons, Norval W. Jasper and William J. Pistor, School Board, Tucson District #1; Richard A. Harvill, President of the University of Arizona, appellees, No. 7406, wherein the judgment of the said Supreme Court was duly entered on the 1st day of May, A. D. 1963, as appears by an inspection of the record of the said Supreme Court which was brought into the SUPREME COURT OF THE UNITED STATES by virtue of a writ of certiorari as provided by act of Congress.

AND WHEREAS, in the October Term, 1963, the said cause came on to be heard before the SUPREME COURT OF THE UNITED STATES on the said transcript of record:

[fol. 110] ON CONSIDERATION WHEREOF, it was ordered and adjudged on June 15, 1964, by this Court that the judgment of the said Supreme Court in this cause be reversed with costs, and that this cause be remanded to the Supreme Court of the State of Arizona for further consideration in light of Baggett v. Bullitt, No. 220, October Term, 1963, decided June 1, 1964.

NOW, THEREFORE, THE CAUSE IS REMANDED to you in order that such proceedings may be had in the said cause, in conformity with the judgment of this Court above stated, as accord with right and justice, and the Constitution and laws of the United States, the said writ of certiorari notwithstanding.

Witness the Honorable EARL WARREN, Chief Justice of the United States, the tenth —— day of July ——, in the year of our Lord one thousand nine hundred and sixty-four.

Costs:

Clerk's costs $100

/s/ John F. Davis
Clerk of the Supreme Court
of the United States

The above amount to be paid directly
to the Clerk of the Supreme Court of
the United States.

No. 553, Misc., October Term, 1963

Barbara Elfbrandt,

vs

Imogene R. Russell, et al.

[fol. 111]

IN THE SUPREME COURT OF THE STATE OF ARIZONA

En Banc

[File Endorsement Ommitted]

No. 7406

BARBARA ELFBRANDT, for herself and others similarly situated, APPELLANTS

v.

IMOGENE R. RUSSELL, L. E. BOOL and MARTHA L. ELLIOTT, members of the Board of Trustees of Amphitheater Elementary School District No. 10, Pima County, State of Arizona; PAUL J. FANNIN, Governor of the State of Arizona; ROBERT W. PICKRELL, Attorney General of the State of Arizona; JEWEL W. JORDAN, State Auditor; LYNN M. LANEY, O. D. MILLER, SAMUEL H. MORRIS, JOHN G. BABBITT, ELDWOOD W. BRADFORD, VIVIAN LAYTI BOYSEN, GEORGE W. CHAMBERS, and LEON LEVY, members of the Board of Regents; W. W. DICK, State Superintendent of Public Instruction, and PAUL J. FANNIN, Governor, ex-officio members of the Board of Regents; FLORENCE REECE, Pime County Superintendent of Schools; ROBERT D. MORROW, Superintendent of Tucson School District #1; JACOB C. FRUCHTHENDLER, DELBERT L. SECRIST, NAN LYONS, NORVAL W. JASPER and WILLIAM J. PISTOR, School Board, Tucson District #1; RICHARD A. HARVILL, President of The University of Arizona, APPELLEES

On Remand from the Supreme Court of the United States
Judgment Reinstated

W. Edward Morgan, Tucson,

Attorney for Appellants

Robert W. Pickrell, The Attorney General and
Philip M. Haggerty, Assistant Attorney General, Phoenix,

Attorneys for Appellees

S. Leonard Scheff, Tucson, and
Robert J. Hirsh, Tucson,

Attorneys for Amicus Curiae Arizona Civil Liberties Union

Amelia D. Lewis, Sun City, and
Jay Dushoff, Phoenix,

Attorneys for Amicus Curiae Arizona Civil Liberties Union (Northern Arizona Chapter)

OPINION—filed December 30, 1964

STRUCKMEYER, *Justice.*

[fol. 112] This case arises out of the refusal of Barbara Elfbrandt, a teacher in the public schools at Tucson, Arizona, to subscribe to the oath required by the Arizona Communist Control Act of 1961 of all public officers and employees. In our decision, Elfbrandt v. Russell, 94 Ariz. 1, 381 P.2d 554, May 1, 1963, we summarily disposed of the issue of the asserted vagueness in the Arizona act with the statement that it "does not have the unconstitutional vice of vagueness and indefiniteness in placing an accused on trial for an offense, the nature of which he is given no fair warning, for punishment is restricted to specified acts knowingly and wilfully committed."[1] The Supreme Court of the United States, by Per Curiam order dated June 15, 1964, vacated the judgment, and remanded the cause to this Court "for further considera-

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[1] 94 Ariz. 1, 8.

tion in light of Baggett v. Bullitt, No. 220, October Term 1963, decided June 1, 1964."

The Arizona oath,[2] with insignificant changes, has been used in the Territory and the State of Arizona for over one hundred years. An oath of allegience in part couched in nearly identical language is required by Congress of those seeking citizenship by naturalization.[3] Plainly, the [fol. 113] Arizona oath is no more than a restatement of the duties of citizenship, an express engagement to which all who are afforded the protective cloak of the Constitution and laws of this country and state are irrevocably bound.

The Washington oath[4] did not by its language confine the taker to the undertakings of citizenship and the faithful and impartial discharge of the duties of an office. It offended because it "is not open to one or a few interpretations, but to an indefinite number" and that only "extensive adjudications, under the impact of a variety

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[2] "State of Arizona, County of ———— I, ———— ————do solemnly swear (or affirm) that
(type or print name)
I will support the Constitution of the United States and the Constitution and laws of the State of Arizona; that I will bear true faith and allegiance to the same, and defend them against all enemies, foreign and domestic, and that I will faithfully and impartially discharge the duties of the office of ———— (name of office) ———— according to the best of my ability, so help me God (or so I do affirm)." A.R.S. § 38-231, subs. G, as amended Laws 1961, Ch. 108, § 5.

[3] "(a) A person who has petitioned for naturalization shall, in order to be and before being admitted to citizenship, take in open court an oath (1) to support the Constitution of the United States; * * * (3) to support and defend the Constitution and the laws of the United States against all enemies, foreign and domestic; (4) to bear true faith and allegiance to the same; * * *." 66 Stat. 258, 8 U.S.C.A. § 1448.

[4] "I solemnly swear (or affirm) that I will support the constitution and laws of the United States of America and of the State of Washington, and will by precept and example promote respect for the flag and the institutions of the United States of America and the State of Washington, reverence for law and order and undivided allegiance to the government of the United States." Wash. Laws 1931, c. 103, § 1.

of factual situations, would bring the oath within the bounds of permissible constitutional certainty." Baggett v. Bullitt, 377 U.S. 360, 378.

We recognize that the words "true faith and allegiance", "defend", and "faithfully and impartially" in the context in which they are used range high in the level of abstractions. But Arizona's general perjury statute, A.R.S. § 13-561, has no application for the act contains an [fol. 114] enumeration of the offenses punishable criminally as perjury, A.R.S. § 38-231, subs. E.[5] A statute which enumerates the subjects or things upon which it is to operate will be construed as excluding from its effect all those not especially mentioned. Lewis v. Industrial Commission, 93 Ariz. 324, 380 P.2d 782. No criminal act is committed under the specific language of the oath if the taker is unfaithful, partial, divides his allegiance or fails to defend the Constitution and laws against all enemies. The test is wholly subjective, binding only to the extent of the individual's conscience.

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[5] "Any officer or employee as defined in this section having taken the form of oath or affirmation prescribed by this section, and knowingly or wilfully at the time of subscribing the oath or affirmation, or at any time thereafter during his term of office or employment, does commit or aid in the commission of any act to overthrow by force or violence the government of this state or of any of its political subdivisions, or advocates the overthrow by force or violence of the government of this state or of any of its political subdivisions or during such term of office or employment knowingly and wilfully becomes or remains a member of the communist party of the United States or its successors or any of its subordinate organizations or any other organization having for one of its purposes the overthrow by force or violence of the government of the state of Arizona or any of its political subdivisions, and said officer or employee as defined in this section prior to becoming or remaining a member of such organization or organizations had knowledge of said unlawful purpose of said organization or organizations, shall be guilty of a felony and upon conviction thereof shall be subject to all the penalties for perjury; in addition, upon conviction under this section, the officer or employee shall be deemed discharged from said office or employment and shall not be entitled to any additional compensation or any other emoluments or benefits which may have been incident or appurtenant to said office or employment." A.R.S. § 38-231, subs. E, as amended Laws 1961, Ch. 108, § 5.

By A.R.S. § 38-231, subs. G public officers and employees who take the oath promise, under penalty of perjury, that they are not knowingly or wilfully engaged in and will not in the future during their terms of office [fol. 115] knowingly or wilfully engage in the conduct specified in A.R.S. § 38-231, subs. E:

1. Commit any act to overthrow by force or violence the government of this state or any of its political subdivisions;

2. Aid in the commission of any act to overthrow by force or violence the government of this state or any of its political subdivisions;

3. Advocate the overthrow by force or violence of the government of this state or any of its political subdivisions;

4. Become knowingly and wilfully a member of the Communist Party of the United States or its successors or any of its subordinate organizations or any other organization having for one of its purposes the overthrow by force or violence of the government of the State of Arizona or any of its political subdivisions and prior to becoming a member of such organization, or organizations, had knowledge of the unlawful purpose of the organization, or organizations;

5. Remain knowingly and wilfully a member of the Communist Party of the United States or its successors or any of its subordinate organizations or any other organization having for one of its purposes the overthrow by force or violence of the government of the State of Arizona or any of its political subdivisions and prior to becoming a member of such organization, or organizations, had knowledge of the unlawful purpose of the organization, or organizations.

The commission of any of these acts at the time of taking the oath or thereafter by a public officer or employee is declared to be a felony punishable in the same manner as perjury. Were we to consider, which we do not, any part of A.R.S. § 38-231, subs. E unconstitutional, the

oath provided by § 38-231, subs. G would not fall for the act provides that if any provision is held invalid, the invalidity shall not affect other provisions which can be given effect.

If we correctly understand the opinion of the Supreme Court of the United States in *Baggett*, it is the sus-
[fol. 116] ceptibility of a statute to the interpretation of required forswearing of an undefinable variety of "guiltless knowing behavior" which is condemned, Cramp v. Board of Public Instruction, 368 U.S. 278, 82 S.Ct. 275, 7 L.Ed.2d 285. In this we think there is a vital distinction between the Washington act[6] and the Arizona act. Arizona does not seek to punish one who advises, teaches or abets or advocates by any means any person to commit or aid in the commission of any act intended to overthrow or alter, or to assist in the overthrow or alteration, of the constitutional form of government by revolution, force or violence. Arizona punishes those who commit or aid in the commission of an act to overthrow the government by force or violence. The act cannot be innocently committed or aided for the legislature has provided that it must be done "knowingly or wilfully"; that is, that it be voluntary and purposeful and not because of a mistake, inadvertence or for any innocent reason or that the act be done with an evil motive to accomplish that which the statute condemns.

By A.R.S. § 13-131, in ever crime or public offense
[fol. 117] there must exist a union or joint operation of

---

[6] Washington required public employees to swear they were not a subversive person as defined by statute:

"'Subversive person' means any person who commits, attempts to commit, or aids in the commission, or advocates, abets, advises or teaches by any means any person to commit, attempt to commit, or aid in the commission of any act intended to overthrow, destroy or alter, or to assist in the overthrow, destruction or alteration of, the constitutional form of the government of the United States, or of the state of Washington, or any political subdivision of either of them by revolution, force, or violence; or who with knowledge that the organization is an organization as described in subsections (2) and (3) hereof, becomes or remains a member of a subversive organization or a foreign subversive organization." Rev. Code Wash. § 9.81.010 (5).

act and intent or criminal negligence. But the crime of committing or aiding in the commission of an act to overthrow the government of the state or any of its political subdivisions cannot be completed if accompanied only by a generalized intent to commit an act. The language of subs. E, A.R.S. § 38-231, requires that it be read as committing or aiding in the commission of an act *in an attempt* to overthrow the government or any of its political subdivisions. The overt act or the aiding therein must be with actual intent to accomplish the result forbidden, State v. Mandel, 78 Ariz. 226, 278 P.2d 413, and a specific intent to overthrow must exist. It must be an intent in fact which cannot be implied or presumed and must be proved by evidence or facts other than those establishing the overt act. Cf. People v. Snyder, 15 Cal. 2d 706, 104 P.2d 639.

Moreover, the act must be such as will apparently result in the usual and natural course of events, if not hindered by extraneous causes, in the overthrow of the government by force and violence. Preparation alone is not enough; there must be some appreciable fragment of the crime committed, and it must be in such progress that it will be consummated unless interrupted by circumstance independent of the will of the attempter, State v. Mandel, supra. Cf. People v. Camodeca, 52 Cal.2d 142, 338 P.2d 903.

In this state there is no distinction between accessories before the fact and principals. A.R.S. § 13-138. All persons concerned in the commission of a crime, whether they directly commit the act constituting the offense or aid or abet in its commission or, not being present, have [fol. 118] advised and encouraged in its commission, are principals. A.R.S. § 13-139. We have construed the aiding required by this statute as some positive act of physical or moral force joining with that of the perpetrator of the crime and producing the result. State v. Martin, 74 Ariz. 145, 245 P.2d 411. The aiding, made punishable by subs. E, is the same as that which would make an accessory before the fact a principal under § 13-139; that is, if the aider is present he must have assisted in commission of the overt act or, if not being present, have

advised *and* encouraged its commission. In a crime where a specific intent is an element there can be no innocent aiding. Acker v. State, 26 Ariz. 372, 226 Pac. 199.

Since both the act and the aiding referred to in the statute must be in attempts with the specific intent to overthrow the government, the Arizona statute § 38-231, subs. E is not afflicted with the many uncertainties in advising, teaching or assocations found potentially punishable in Baggett v. Bullitt, supra. Nor does it reach endorsements or support for Communist candidates for office nor a lawyer who represents the Communist Party, or its members, nor journalists who defend the Communist Party, its rights, or its members. Such conduct is neither an act nor in aid of an act attempting to overthrow the government by force and violence.

It is our conclusion that the portions of the Arizona act here considered do not forbid or require conduct in [fol. 119] terms so vague that men of common intelligence must necessarily guess at the meaning and differ as to their application.

The judgment of the superior court is ordered reinstated.

FRED C. STRUCKMEYER, JR., *Justice*

CONCURRING:

JESSE A. UDALL, *Chief Justice*

LORNA E. LOCKWOOD, *Vice Chief Justice*

EDWARD W. SCRUGGS, *Justice*

[fol. 120]

BERNSTEIN, *Justice* (Dissenting)

In my concurring opinion in the original decision in this case I stated that the statute would be constitional only if it provided for a hearing which complied with the requirements of procedural due process and at which the State had the burden of proving the disloyalty of those excluded from public employment. My analysis of Baggett v. Bullitt, 377 U.S. 360 now convinces me that such a hearing could not save the constitutionality of the Arizona statute.

The majority ignores the troublesome clauses of A.R.S. § 38-231 E. These are the provisions of the Act which prohibit one from becoming or remaining a member of certain organizations. One of its provisions prohibits membership in ". . . any other organization having for *one* of its purposes the overthrow by force or violence of the government of the state of Arizona or any of its political subdivisions . . ." (Emphasis supplied) Let us consider a scientist, a teacher in one of our universities. He could not know whether membership is prohibited in an international scientific organization which includes members from neutralist nations and Communist bloc nations—the latter admittedly dedicated to the overthrow of our government and which control the organization—even though access to the scientific information of the organization is available only to its members.

> "It is subversive activity, for example, to attend and participate in international conventions of mathematicians and exchange views with scholars from Communist countries?" Baggett v. Bullitt, 377 U.S. at 369.

Though all might agree that the principal purpose of such an organization is scientific, the statute makes his membership a crime if any subordinate purpose is the overthrow of the state government. The vice of vague-
[fol. 121] ness here is that the scientist cannot know whether membership in the organization will result in prosecution for a violation of § 38-231 E or in honors

from his university for the encyclopedic knowledge acquired in his field in part through his membership.

> "It will not do to say that a prosecutor's sense of fairness and the Constitution would prevent a successful perjury prosecution for some of the activities seemingly embraced within the sweeping statutory definitions. The hazard of being prosecuted for knowing but guiltless behavior nevertheless remains. 'It would be blinking reality not to acknowledge that there are some among us always ready to affix a Communist label upon those whose ideas they violently oppose. And experience teaches us that prosecutors too are human.'" Baggett v. Bullitt, 377 U.S. at 373.

In such a case even approval of his membership in the organization by the United States State Department could not assure him that he would not be prosecuted, as this is a state criminal statute.

> "Those with a conscientious regard for what they solemnly swear or affirm, sensitive to the perils posed by the oath's indefinite language, avoid the risk of loss of employment, and perhaps profession, only by restricting their conduct to that which is unquestionably safe." Baggett v. Bullitt, 377 U.S. at 372.

Free association may not be so inhibited.

In view of the direction of the United States Supreme Court that we reconsider this case in the light of what was said in Baggett, I do not discuss the violence done by this statute in hampering the right of free association guaranteed by the First Amendment.

I respectfully dissent.

CHARLES C. BERNSTEIN, *Justice*

[fol. 122]

IN THE SUPREME COURT OF THE STATE OF ARIZONA

Received, February 1, 1965, Clerk, Supreme Court

Filed, Feb. 1, 1965, Sylvia Hawkinson, Clerk, Supreme Court

Feb. 1, 1965 PM, Attorney General, State of Arizona

No. 7406

BARBARA ELFBRANDT, for herself and others similarly situated, APPELLANTS

vs.

IMOGENE R. RUSSELL, ET AL., APPELLEES

MOTION FOR REHEARING

COME NOW the Appellants and move the Court for rehearing in the above-entitled matter for the reasons and upon the grounds hereinafter set forth.

IT IS RESPECTFULLY SUBMITTED that the Court should rehear the above case for the following reasons:

If counsel understands the ruling of the majority of the Court in its recent opinion in this case, the Court is in effect legislating by rewriting Subsection (e) of the Statute. Counsel interprets the decision to mean that it is rewriting Subsection (e) to provide by judicial fiat that in addition to advocating the "overthrow by force or violence of the government of the State of Arizona or any of its political subdivisions," the advocacy must be joined by an overt act or the aiding in an overt act with the actual intent to accomplish the forbidden result with specific intent to overthrow, and that the proof of the specific intent must be shown by other overt acts.

One could then rewrite Section 3 by saying, in legislative terms, that a person who knowingly advocates the

overthrow by force or violence of the government of the State, with the specific intent to overthrow the government by force or violence, and engages in an overt act or acts with the actual intent to accomplish the forceful overthrow, or who aids in the commission of an overt act to overcome the government by force or violence, with [fol. 123] the actual intent to overthrow the government by force or violence, is guilty of a violation of the Statute and has committed an act of perjury under the terms of the Statute.

This judicial conclusion may on its face afford a constitutional predicate for the statute, and assuming for the moment that it does: (1) Does it solve the dilemma given rise by this type of legislation; and (2) does the Court have the authority to rewrite legislation; and (3) if it does have the authority, it is wise for the Court to engage in this rewriting of legislation?

ONE: Does the Court's decision solve the evil of the legislation.

It is respectfully submitted that by the fact of the split decision of this Court and the very fact that the United States Supreme Court granted certiorari in this case and referred the matter back for review, indicates that the statute is so vague that men of decent intelligence and fair heart cannot guide their conduct so as to be able to fully engage in their activities of freedom of speech and association without fear of prosecution under this statute.

A discerning law review on this matter is written in *Law in Transition* Quarterly, Vol. 1, FALL 1964, No. 4, "Arval A. Morris, *Baggett* v. *Bullitt*: Scienter & 'Guiltless Knowing Behavior'."

TWO: There are enough historical precedents and it is a general rule of constitutional law that the Court should attempt by all reasonable means to give legislation such a construction as would let its application in the particular case be constitutional.

A survey of these cases in the field of loyalty oaths indicates that as far as the courts will go is to add the quality of scienter when it is not explicit, but it would [fol. 124] appear to add restrictive conditions and the

detail and profusion which this Court's decision makes to the existing statute is far beyond the rule of reasonable construction and becomes in effect judicial legislation which is barred by the constitution of the State of Arizona in the division of authorities between the legislature, the executive and the judicial branches of government.

THREE: Assuming that the Court has the power and jurisdiction to do so, is it wise.

The object of the Court in its majority decision must be understood as an attempt to clarify the statute so that men of good will can understand the legislation and go about their normal affiairs of life with a precise instruction as to what of their conduct is legal and what of their conduct is illegal. Counsel suggests that the decision only makes the person more wary and more in need of legal advice than before.

If this were in the field of tax legislation where there is a long history of business experience to deal with economic matter, the habit of most people is to hire experts and accountants to advise them, then the complicated methodology of analysis undertaken by the majority decision might be acceptable; but this legislation deals with freedom of speech and freedom of assembly, it is criminal in its nature, and it is the legislation itself which must speak to the people in terms which are clear. It is the legislative vagueness that must be corrected. This Court would appear by its majority decision to expect laymen and their legal advisors to have more confidence in the super-restraint of courts in connection with the *stare decisis* than most lawyers today would believe reasonable. It means that if a person is an employee in this state engaged in the simple conduct of, in the express words of Subsection 3, advocating "the overthrow by force or violence of the government of this state or any of its [fol. 125] political subdivisions," and that is all he does, the sole reliance is that a future Court of this state will not modify this present court's interpretation of the statute and sustain a confiction for perjury.

It is the opinion of counsel that this is an unreasonable burden to place upon lawyers advising clients and upon laymen reading the statute, and more particularly regard-

ing the "square words" of the statute as incorporated in the oath that they sign.

It is suggested by counsel that the reasonable approach is to declare this legislation unconstitutional even within the terms of the majority decision and refer it back to the legislature and let the legislature redraft the legislation in light of the criteria laid down in the majority's decision. Then if the laymen can rely on the legislation, there is no chance of judicial decision to disrupt his reliance.

Therefore, Appellants respectfully request a rehearing before this Court on the issues involved.

RESPECTFULLY SUBMITTED this 28th day of January, 1965.

/s/ W. Edward Morgan
45 West Pennington Street
Tucson, Arizona
Attorney for Appellants

Copy mailed January 28, 1965, to:

DARRELL F. SMITH
The Attorney General
Capitol Bldg.
Phoenix, Arizona
Attorney for Appellees, &

PIMA COUNTY ATTORNEY
Pima County Courthouse
Tucson, Arizona

[fol. 126] SUPREME COURT

STATE OF ARIZONA
Phoenix

February 18, 1965

No. 7406

BARBARA ELFBRANDT, for herself and others similarly situated, APPELLANTS

v.

IMOGENE R. RUSSELL, ET AL., APPELLEES

The following action was taken by the Supreme Court of the State of Arizona on February 17, 1965, in regard to the above-entitled cause:

"ORDER: Motion for Rehearing—DENIED.
Justice Bernstein voted to grant.
Justice McFarland did not participate."

SYLVIA HAWKINSON, Clerk

By .....
Assistant Clerk

To—W. Edward Morgan
45 W. Pennington
Tucson, Arizona

Darrell F. Smith, Attorney General
Phoenix, Arizona

Attention: Philip Haggerty
Asst. Attorney General

Norman E. Green, County Attorney
Lawrence Ollason, Special Deputy County Attorney
% Pima County Courthouse
Tucson, Arizona

[fol. 127]

IN THE SUPREME COURT OF THE STATE OF ARIZONA

To the Honorable the Superior Court of the State of Arizona in and for the County of Pima

GREETING:

Whereas, lately in the Superior Court of the State of Arizona in and for the County of Pima, before you in a cause between BARBARA ELFBRANDT, for herself and others similarly situated, Plaintiffs, v. IMOGENE R. RUSSELL, L. E. BOOL, and MARTHA L. ELLIOTT, members of the Board of Trustees of Amphitheater Elementary School District No. 10, Pima County, State of Arizona; PAUL J. FANNIN, Governor of the State of Arizona; ROBERT W. PICKRELL, Attorney General of the State of Arizona; JEWEL W. JORDAN, State Auditor; LYNN M. LANEY, O. D. MILLER, SAMUEL H. MORRIS, JOHN G. BABBITT, ELWOOD W. BRADFORD, VIVIAN LAYTI BOYSEN, GEORGE W. CHAMBERS, and LEON LEVY, members of the Board of Regents; and W. W. DICK, State Superintendent of Public Instruction, and PAUL J. FANNIN, Governor, ex-officio members of the Board of Regents; FLORENCE REECE, Pima County Superintendent of Schools; ROBERT D. MORROW, Superintendent of Tucson School District #1; JACOB C. FRUCHTHENDLER, DELBERT L. SECRIST, NAN LYONS, NORVAL W. JASPER and WILLIM J. PISTOR, School Board, Tucson District #1; and RICHARD A. HARVILL, President of the University of Arizona, Defendants. Case No. 68451: said Superior Court entered its judgment on the 30th day of June, 1961, in favor of the defendants and against the plaintiffs [fol. 128] as by the inspection of the record of the said Superior Court, which was brought into the Supreme Court of the State of Arizona by virtue of an appeal by plaintiffs agreeably to the law in such case made and provided fully and at large appears.

WHEREAS, on the first day of May, 1963, it was ordered by this Court that the judgment of said Superior Court be affirmed.

AND WHEREAS, thereafter on the fifteenth day of June, 1964, the Supreme Court of the United States vacated the judgment and remanded the cause to this Court for further consideration.

[fol. 129] And Whereas, in September, in the year of our Lord one thousand nine hundred and sixty-four, the said cause came on to be heard before the said Supreme Court, and was submitted for decision after argument of counsel. On Consideration Whereof, it was on the thirtieth day of December in the year of our Lord one thousand nine hundred and sixty-four, ordered by this Court that the judgment of the said Superior Court in this cause, appealed from be, and the same is hereby ordered reinstated.

[fol. 130] You therefore are hereby commanded that such proceedings be had in said cause, as according to the decision and order of this Court, and as according to right and justice, and to law, ought to be had.

Witness, the Honorable Lorna E. Lockwood, Chief Justice of the Supreme Court of the State of Arizona, the twenty-third day of February, in the year of our Lord one thousand nine hundred and sixty-five.

Costs of .....

Clerk	$.....
Reporter's Transcript..	$.....
Transcript of Record..	$.....
Abstract of Record.....	$.....
Brief	$.....
	$.....

Sylvia Hawkinson
Clerk of the Supreme Court
of the State of Arizona

No. 7406

SUPREME COURT OF THE STATE OF ARIZONA

BARBARA ELFBRANDT, for herself and others similarly situated, APPELLANTS

vs.

IMOGENE R. RUSSELL, L. E. BOOL, and MARTHA L. ELLIOTT, etc., et al., APPELLEES

COPY OF MANDATE

Issued February 23, 1965.

[fol. 131]

SUPREME COURT OF THE UNITED STATES

No. 168 Misc., October Term, 1965

BARBARA ELFBRANDT, PETITIONER

v.

IMOGENE R. RUSSELL, ET AL.

On Petition for Writ of Certiorari to the Supreme Court of the State of Arizona.

ORDER GRANTING MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND ALLOWING CERTIORARI—October 11, 1965

On consideration of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted. The case is transferred to the appellate docket as No. 656.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1965 794633 857

FILE COPY

FILED
JUN 7 1965
JOHN F. DAVIS, CLERK

PETITION NOT PRINTED

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. [redacted] 656

~~No. 1010 Misc.~~

BARBARA ELFBRANDT, *Petitioner*,

v.

RICHARD J. DOWDALL, T. M. ELLIOTT, GEORGE B. MORSE, ROY L. RUCKER, EDGAR BUTTERBAUGH, Members of the Board of Trustees of Amphitheater Elementary School District No. 10, of Pima County, State of Arizona, *Respondents*.

On Writ of Certiorari to the United States Supreme Court

BRIEF FOR THE RESPONDENTS

NORMAN E. GREEN
County Attorney

LAWRENCE OLLASON
Special Deputy County Attorney

October, 1964

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 1318 Misc.

BARBARA ELFBRANDT, *Petitioner,*

v.

RICHARD J. DOWDALL, T. M. ELLIOTT, GEORGE B. MORSE, ROY L. RUCKER, EDGAR BUTTERBAUGH, Members of the Board of Trustees of Amphitheater Elementary School District No. 10, of Pima County, State of Arizona, *Respondents.*

On Writ of Certiorari to the United States Supreme Court

BRIEF FOR THE RESPONDENTS

COMES NOW the above named Respondents and file their brief for and on their behalf only and do not respond on behalf of any other named Respondents.

The Respondents are satisfied that the reference to the Official Report of the Opinion in the lower Court, the Statement of grounds on which jurisdiction of the Court is involved, Questions presented for review, Con-

stitutional provisions which the case involves, Statement of the case containing fact material to the consideration of the question presented and Statement of the stage in the proceedings in the lower courts the Federal questions were raised are substantially correct. Respondents will not repeat the foregoing and will commence with the Summary of the Argument in response.

ARGUMENT

Loyalty to the State and Federal Government may be a prescribed qualification for the holding of public employment.

I

The Legislation referred to in Petitioners Application for Writ of Certiorari is not a violation of the Guarantee of Procedural due process and there is no legitimate issue of procedural due process contained in Petitioners Application for Writ of Certiorari.

The Petitioner claims that the statute in question is unconstitutional as it is too vague. This argument states that certain words in the statute, if viewed by themselves as words, and with sematic and philosophical concern, might not be subject to exact definition. Our attention is particularly drawn to "unknowingly," "willful," "member," "advocates the overthrow," and a few others.

It is not difficult to pick one word out of a statute and around that word develop a theory which will show that the word might not be capable of mathematical exactitude. However, statutes have to be expressed in words. We have not yet been able to draft a code in binary mathematical form so as to enable a computing machine to try cases.

However, courts for a number of years have held that the meaning of words as used in statutes is to be found in the common understanding of men. Petitioner herself points out many definitions of the word "unknowingly." It is submitted that this word has been defined sufficiently so that adequate instruction can be given to a jury and that the word itself carries a common sensible meaning for mankind. The Petitioner contends that this word does not necessarily carry with it any connotation of evil intent. This is correct. However, it never has been a criterion of a criminal statute that a violation of the statute must always be accompanied by a specific independent criminal or evil intent. Where the act involved is merely malum prohibitum the courts have often required a specific evil intent as in *People* v. *Campobello,* (1959) 193 N.Y.S. 2d 266. However, this is not true where the act is malum in se. I doubt that no one can seriously argue that the overthrow of our government by force or by violence is merely malum prohibitum.

The Petitioner further contends along this line of thinking that a person might be criminally responsible even though he performs an act under a deep and sincere religious belief, that the performance is not only his right, but his duty. Even assuming the somewhat unbelievable thought that a religion might require perjury, the argument is untenable. In our State of Arizona, we have had an example of a sincere religious belief which advocated an act made criminal by law. But polygamy is still punishable and the statutes prohibiting same have been upheld. In our country we have fortunately no history of religious fanatics whose salvation is attained only through assassination, but even in those countries where it has existed, the rite is still treated as murder.

The Petitioner complains about the word "willful," Respondents submit, however, that this word has been sufficiently defined through our courts of criminal law history to preclude all reasonable doubts as to its common meaning. Would the Petitioner argue that a person convicted of first degree murder could hold the Constitution unconstitutional because his definition of "wilful" is different from that held by all courts of law? Similar questions as to the meaning of other words such as "advocacy" have been raised and answered before by the high courts of our land. In none of these cases has the statute containing these words been stricken for unconstitutionality. *Yates* v. *United States,* (1957) 354 U.S. 298. This Court has considered the language, arrived at its true constitutional meaning and the statute now before us reaps the benefit of these decisions and stands free from any vagueness or doubt as to meaning or effect.

The issues concerning possible confusion over the meaning of "member" or "membership" was decisively answered in *Scales* v. *United States,* (1961) 367 U.S. 203. The statute at issue was the so-called membership clause of the Smith Act, 18 U.S.C. 2385. The law was similar to ours in that it made a person who became or remained "a member of, ... any such society, group or assembly of persons, knowing the purpose thereof . . . ." subject to conviction for a felony. This Court upheld the conviction under this statute despite every conceivable unconstitutional objection, along with a specific and direct attack on the word "member" as being too vague. The court upheld that membership must be more than "nominal" it must be reasonable "active" citing previous cases to that effect at pages 222 and 223 of the *Scales* Case, *supra* 367 U.S. 203. As Justice Frankfurter pointed out the court had no hesitance in adopting such a position

and interpretation to protect the constitutionality of the statute and this court should find no difficulty in deciding the same once again.*

Under the issue of vagueness the Petitioner contends that a person might sign an oath and trap himself if he were a member of an organization that might later be found communistic. She states that the words "subordinate organization" of "other organization" are too vague for the understanding of man. However, the statute itself resolved the problem by making the test not only the nature of the organization, but the individual knowledge of that nature. Thus a person cannot be convicted and runs no danger unless the state can show that she actually knew and actively was a member of an organization which she knew was dedicated to the overthrow of our government by force or violence.

The Petitioner further contends that the administration of the act is somewhat vague. The law itself in Title 38 A.R.S. 38-231(A) 1956 as amended states who shall prepare the oath and in A.R.S. 38-233, 1956 as amended states where it shall be filed. We have a great many boards and agencies in our state and further exactitude would be impossible lengthy and cumbersome. We have heard no specific complaints and a statement that there might be some doubt and some unspecified or unknown circumstance is hardly enough to invalidate the act.

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*In the *Scales* Case, *supra*, 367 U.S. 203, Warren, D.J. and Brennen, J. dissented on the grounds not present herein, to wit, the possibility of conflict with or implied repeal by a later federal statute.

Finally, on this issue, it is submitted that the *Scales* Case, *supra,* 367 U.S. 203, the *Yates* Case, *supra,* 354 U.S. 298, and the *Dennis* v. *United States,* (1951) 341 U.S. 494, clearly answer all the issues of vagueness. And in an area apart from the Smith Act we have *The American Communication Association* v. *Douds,* (1950) 339 U.S. 382, and *Garner* v. *The Board of Public Works,* (1951) 341 U.S. 716, to show clearly that such statutes are not vague within the meaning of the due process clause of the Constitution of the United States.

II

The Petitioner then claims that the Legislation violates Article I, Section 10, of the U. S. Constitution (Bill of Attainder). This is not so.

A bill of attainder is a legislative act which inflicts punishment without judiciary trial and includes those acts which take away the life, liberty or property of a particular named or easily ascertainable person or group of persons for the reason that the legislature believes them guilty of conduct which deserves punishment. *United States* v. *Lovett,* (1946) 328 U.S. 303; *Bauer* v. *Acheson,* (C.D.C. 1952) 106 F. Supp. 445; *The Communist Party* v. *Subversive Activities Control Board,* (1961) 367 U.S. 1. However, to constitute such a bill the legislature must punish a past act and a statute imposing standards of qualifications and operating prospectively does not come within this class. *Peters* v. *New York City Housing Authority,* (1953) 128 N.Y.S. 2d 224; modified 128 N.Y.S. 2d 712 (App. Div.), rev'd on other grounds, 307 N.Y. 519, 121 N.E. 2d 529; *National Maritime Union of America* v. *Herzog,* (C.D.C. 1948) 78 F. Supp. 146; *Communist Party* v. *Subversive Activities Control Board, supra,* 367 U.S. 1. It is obvious that the statute in question operates pro-

spectively only. The only mention made of past conducts, associations or vocations is that they cannot be used against a person to bring an action under this act.

In addition, there are certainly no named persons and the only "group" named therein is the entire body of public employees in this state, in numbers somewhat in excess of 40,000. The bill is no more a bill of attainder than a statute defining and setting forth the punishment for burglary. The argument of the bill of attainder has been raised and rejected in the *Scales* Case, *supra,* 367 U.S. 203, the *Garner* Case, *supra,* 341 U.S. 716; and the *Dennis* Case, *supra,* 341 U.S. 494.

As to the contention of Petitioner that such oaths amount to a bill of attainder, the Supreme Court has repeatedly held that they do not amount to a bill of attainder where they are used to a reasonable standard of qualifications for certain public employment. *American Communications* Case, *supra,* 339 U.S. 382.

In the case of *Wieman* v. *Updegraff,* (1952) 344 U.S. 183, one of the cases in which this Court held loyalty oath provisions to be unconstitutional; a defect not present in the Arizona oath was involved in the oath construed by this Court. The Arizona statute does not rest on any implications of knowledge regarding the character of the organizations involved since any sanctions involved in the Arizona statute are predicated solely on knowledge. Therefore, Respondents respectfully urge upon the court that the validity of such oaths when used as a test of fitness and where knowledge of the nature of the prescribed organizations is required, is proper as it unquestionably is under the legislation enacted in Arizona.

III

The Petitioner then claims that the Legislation is a violation of the Fifth Amendment to the United States Constitution.

It is attacked as procedurally defective in that notice and hearing are essential in order to discharge an employee for loyalty reasons and that automatic operation of such a statute violates due process. This ground was relied on in *Slochower* v. *Board of Higher Education of New York City,* (1956) 350 U.S. 551, where a professor was fired for refusal to answer a Senate Subcommittee's questions concerning his communist affiliations, and also relied on in *Adler* v. *Board of Education of The City of New York,* (1951) 342 U.S. 485, and the *Garner* Case, *supra,* 341 U.S. 716, in which provisions were made for hearing and review. The answer to this contention is that in the *Slochower* Case, *supra,* 350 U.S. 551, no hearing was needed because no substantial relationship existed between pleading the Fifth Amendment before an outside committee and the disqualification for public employment. In the *Adler* Case, *supra,* 342 U.S. 485, and the *Garner* Case, *supra,* 341 U.S. 716, hearings were necessary only because the particular statutes involved did not expressly require knowledge, and a hearing was therefore needed to establish "knowing" membership under those statutes. Notwithstanding that hearings were given for the above reasons in the *Garner* Case, *supra,* 341 U.S. 716, the main ground for discharge was the employee's refusal to sign the oath, rather than the results of the inquiry.

Further reason for dispensing with a hearing lay in the fact that such statutes prescribe a standard of eligibility of fitness rather than imposing a penalty and therefore a hearing is not required.

For a second ground, it is contended that the use of such oaths is not a reasonable attempt to avert a substantial danger; asserting that withholding pay without discharging the parties involved averts no danger, but is only arbitrary limitation set down denying equal protection under the law, since it is contended that both the loyal and the subversive can continue to work. The fallacy of this contention is that it is founded on the illogical position that which discharge is constitutional, the lesser penalty (loss of pay) is a violation of fundamental right. As was so pointedly concluded in an article in 32 Notre Dame Law Review, 527,

> ". . . *whether loyalty oaths basically are wise or unwise, remains a question for the legislature and not for the courts to answer.*" (emphasis supplied)

If the measures taken by a state to screen itself against erosion from within result in a curtailment of liberties and privileges ordinarily enjoyed by a citizen, the state must be prepared to justify its actions.

An excellent judicial analysis of the lengths to which the state may go under a given set of circumstances is to be found in the remarks of this Court in the *American Communications* Case, *supra,* 339 U.S. 382. This Court stated:

> "Although the First Amendment provides that Congress shall make no law abridging the freedom of speech, press or assembly, it has long been established that those freedoms themselves are dependent upon the power of constitutional government to survive. If it is to survive. If it is to survive it must have power to protect itself against unlawful conduct and, under some circumstances, against incitements to commit unlawful acts."

In discussing the regulation requiring a non-communist affidavit in the *American Communications* Case, *supra,* 339 U.S. 382, it was stated:

> "The 'reasons advanced in support of the regulation' are of considerable weight, as even the opponents of Section 9 (h) agreed. They are far from being '(m)ere legislative preferences or beliefs respecting matters of public convenience (which) may well support regulation directed at other personal activities, but be insufficient to justify such as diminishes the exercise of rights so vital to the maintenance of democratic institutions.' It should be emphasized that Congress, not the courts, is primarily charged with determination of the need for regulation of activities affecting interstate commerce. This Court must, if such regulation unduly infringes personal freedoms, declare the statute invalid under the First Amendment's command that the opportunities for free public discussion be maintained. But insofar as the problem is one of drawing inferences concerning the need of regulation of particular forms of conduct from conflicting evidence, this Court is in no position to substitute its judgment as to the necessity or desirability of the statute for that of Congress. Cf. United Public Workers v. Mitchell, supra (330 US at 95, 102, 91 L ed 770, 774, 67 S. Ct 556). In Bridges v. California (US) supra, we said that even restrictions on particular kinds of utterances, if enacted by a legislature after appraisal of the need, come to this Court 'encased in the armor wrought by prior legislative deliberation.'"

Of further special interest is the opinion concurring and dissenting each in part of Justice Jackson in the *American Communications* Case, *supra,* 339 U.S. 382, in which he sets forth five cardinal reasons why the Communist Party and its successor organizations or those similarly devoted to the violent overthrow of the government through other than Constitutional means is to be distinguished from

the treatment afforded and preserved by our Constitution to other political parties. These five objectives or characteristics are set forth by Justice Jackson as follows:

> 1. The goal of the Communist Party is to seize powers of government by and for a minority rather than to acquire power through the vote of a free electorate.
>
> 2. The Communist Party alone among American Parties, past or present, is dominated and controlled by a foreign government.
>
> 3. Violent and undemocratic means for the calculated and indispensable methods to obtain the Communist Party's goal.
>
> 4. The Communist Party has sought to gain this leverage and hold on the American population by acquiring control of the labor movement.
>
> 5. Every member of the Communist Party is an agent to execute the Communist program.

The Petitioner's discharge for the refusal as employees under the State to obey the legislative directive here violated n liberties secured by the Constitution and not forbidden thereby. *Taylor* v. *Beckham*, (1900) 178 U.S. 548, *Wilson* v. *North Carolina* (1898) 169 U.S. 586, and *Snowden* v. *Hughes*, (1943) 321 U.S. 1.

The summary of the *Garner* Case, *supra*, 341 U.S. 716, is revealing as it pertains to the instant litigation. In that case, the City Charter barred from employment persons who advise, advocate or teach the violent overthrow of the government, or who are members of or become affiliated with any group doing so. A City Ordinance required every employee to take an oath that within a period subsequent to the enactment of the Charter provision he has not been a member of, or become affiliated with such

a group, and also to execute an affidavit to the same effect. The affidavit, however, containing no time limitation. Some of the plaintiffs took the oath, but refused to execute the affidavit. The others refused to do both. All were discharged for such cause and sought reinstatement, raising various constitutional objections. Relief was denied in the state courts. In an opinion by Justice Clark, five members of this Court held that neither the affidavit nor the loyalty oath requirement violated the provisions of Article I, Section 10 of the Federal Constitution against bills of attainder and ex post facto laws nor deprived the employees of freedom of speech and assembly and of the right to petition for redress of grievances. A due process objection derived from the fact that the oath was not limited to affiliations known to the employee to be in the prescribed class was rejected and the judgment of the state court was affirmed on the assumption that scienter was implicit in each clause of the oaths.

Justice Frankfurter concurring in part and dissenting in part in the *Garner* Case, *supra,* 341 U.S. 716 at 724 said:

> "The constitution does not guarantee employment. City, State and Nation are not confined to make the provision appropriate for securing competent professional discharge of the functions pertaining to divirse governmental jobs. They may also assure themselves of fidelity to the very pre-suppositions of our scheme of government on the part of those who seek to serve it. No unit of government can be denied the right to keep out of its employe those who seek to overthrow the government by force or violence or are knowingly members of an organization engaged in such endeavor."

The doctrine of denying positions of public importance to groups of persons identified by business or other past associations has been long established as evidenced by Federal legislation forbidding persons engaged in stock underwriting to hold office as directors of national banks. *Board of Governors Federal Reserve System* v. *Agnew*, (1947) 329 U.S. 441.

In addition to the above, it is further urged upon the Court that even assuming that some doubt exists as to the legality of certain sections of this legislation, the oath itself is severable and its constitutionality would stand even against a finding that another portion of the Act is itself unconstitutional. This results from the long recognized rule of statutory construction that if a construction can be given which will impair only part of the legislation under attack, that such a construction should be adopted enabling the remainder to retain its validity. Adopting this construction, a cursory glance at Section 38-231(A) A.R.S. 1956 as amended, reveals that the oath, which is the sole and separate thing required to be affirmed or sworn to by the employee, is set apart and is distinct from the other provisions of the Act. It would be difficult to imagine a more innocuous or non-committal averment of olyalty than that contained in the provisions of the oath itself. Indeed, with the exception of two words, it is identical with the oath of office long in effect in this state and is further virtually identical with the oath taken by Federal officers and the President as a prerequisite to assuming the duties of their offices. Thus, viewed it becomes crystal clear that the oath in and of itself, which is really the only thing subject to attack, is free from any of the impediments urged upon the Court in connection with the other portions of this legislation.

IV

The Petitioner's next claim is that the legislation is a violation of the Equal Protection of the Law guaranteed under the Fourteenth Amendment.

Petitioner assumes that the bill has placed state employees in a different class than other citizens of the state. This is true. However, it is uniform constitutional law that as long as classes are treated equally within themselves and as long as the classification is reasonable, there is no constitutional problem. Petitioner seems to doubt that placing municipal employees engaged in garbage collection in the same class as college professors is inherently unreasonable. This factual situation itself calls for some comment. An employee of a public waterworks, no matter how menial, might be in a position to discredit or pollute that system at an appropriate moment. See the detailed qualifications of communist party training contained in pages 235 through 255 in the *Scales* Case, *supra*, 367 U.S. 203. Even an employee in the sanitation system might well have access to municipal garage facilities and thus be able to do damage in an emergency. Suffice to say that David Greenglass of Los Alamos notoriety was an enlisted man, a technical sergeant, a very low rank indeed in the complex of military stature and scientific genius at work on the Manhattan project.

But even if we do not wish to anticipate such a disasterous occurrence, Petitioner's argument must fail for another reason. Any state or any public body has an inherent right to place reasonable terms or conditions upon its employees. Every state in the United States places a requirement on citizenship upon the employees of that state (with certain exceptions in the teaching field similar to Article 18, Section 10 of the Arizona Constitution). Some

states even require that persons working on public contracts, although not actual state employees, must be citizens; or in any event that citizens shall have first choice for public contract employment. These have been uniformly upheld and on no stronger a basis than the judicial holding that the communities' tax dollars should be returned to citizens of the community and not transients or citizens of foreign nations. *Heim* v. *McCall,* (1915) 239 U.S. 175; *People* v. *Crane,* (1915) 214 N.Y. 204, 108 N.E. 427; *Schrey* v. *Allison Steel Mfg. Co.,* (1953) 75 Ariz. 282, 255 P. 2d 604.

Similarly here the Arizona legislature felt that perhaps more than a hint of rationality that citizens' tax dollars should not be paid to those actively attempting to forceably or violently overthrow our government.

This Court has consistently upheld this position. See the *Garner* Case, *supra,* 341 U.S. 716, and particularly the language of Justice Minton in the *Adler* Case, *supra,* 342 U.S. 485. In quoting from the *Garner* Case, *supra,* 342 U.S. at 492-493 he said:

> "We think that a municipal employer is not disabled because it is an agency of the State from inquiring of its employees as to matters that may prove relevant to their fitness and suitability for the public service. Past conduct may well relate to present fitness and suitability for the public service. Past conduct may well relate to present fitness; past loyalty may have a reasonable relationship to present and future trust. Both are commonly inquired into in determining fitness for both high and low positions in private industry and are not less relevant in public employment."

V

The Petitioner then claims that the legislation is a

violation of freedom of speech and assembly.

The Petitioner attempts to state that the discrimination is unlawful as it infringes upon freedom of speech, assembly and association. She confuses her argument however. If the statute does so infringe then it is unconstitutional because of that fact, and not because the law applies to public and not private employees. If it is not an infringement of speech and the associated freedoms, then discrimination between public and private employees must be tested by the norm of whether or not it is arbitrary or capricious. As the cases and argument outlined above have noted it is not arbitrary or capricious to separate public employees from private employees.

If we turn then to the consideration of whether or not the act infringes on freedom of speech, assembly or association, we have a separate problem. The act itself does not prohibit or punish any speech short of advocacy of the overthrow of the government by force or violence. The *Yates* Case, *supra,* 354 U.S. 298, has stated that such activities may be proscribed by law and has set forth the meaning of advocacy in this type of legislation. The mere fact that some speech may be restrained by some act does not in and of itself violate the Constitution of the United States. To give some obvious examples we have the Hatch Act, 18 U.S.C. 61, which prohibits political activities by federal employees. This directly interferes with the right of certain individuals to make speeches or actively support candidates of their choice. The constitutionality of this was upheld; *United Federal Workers* v. *Mitchell,* (1946) 330 U.S. 73. Similar laws against false advertising which prohibit freedom of writing have been upheld. *E. F. Drew & Co.* v. *Federal Trade Commission,*

(1956) 235 F. 2d 735 (2d Cir.), certiorari denied, 352 U.S. 969. It is obvious that libel has never been a constitutionally protected area of free speech. *Caldwell* v. *Crowell-Collier Pub. Co.*, (1947) 161 F. 2d 333 (5th Cir.), certiorari denied 332 U.S. 766. Similarly the statutes relating to lobbying which also infringe directly on free speech have been upheld. *United States* v. *Harriss*, (1954) 347 U.S. 612. Must we once again bring back Justice Holmes' example that the shouting of "fire" in a crowded theatre rests on inherently different grounds than a speech denouncing vivisection. It would appear obvious that the suppression of a riot or the breaking up of a juvenile gang "rumble" is somewhat not quite the same as breaking up a meeting of the John Birch Society.

VI

The Petitioner then claims that the Arizona Statute is unconstitutional in light of this Court's ruling in *Baggett* v. *Bullitt* (1963) 12 L. Ed. 2d. 377.

The ruling in the *Baggett* Case in effect found the words — Teaching and Advice — to be vague. The Arizona Law does not contain these words. The Arizona statute provides that the only aiding or assisting which can be condemned is the aiding or assisting in the commission of an act to overthrow by force or violnce. A.R.S. 13-707(A) as amended.

The prohibition contained in the Arizona Statute is a Prohibition against a direct act of force or violence, or aiding of a direct act of force or violence and it appears that the *Baggett* Case did not criticize this language.

The next provision of the Arizona Statute applicable is that one who knowingly or willfully advocates the overthrow by force of violence the government of this state —

this certainly is clear and distinct. There are no hidden devises to trap the unsuspectng.

The Arizona oath is more nearly allied to the oath previously affirmed by this Court in *Gerende* v. *Board of Supervisors* (1951) 341 U.S. 56, 71 S.Ct. 565, 95 L. Ed. 745 and this particular decision was actually reaffirmed in *Baggett* v. *Bullitt* (1963) 12 L. Ed. 2d 377.

CONCLUSION

In conclusion it seems unbelievable to say that a state can be prohibited from punishing those who are attempting to destroy it by force or violence. The attempt can appear in many ways. It can be as drastic as manning barricades in the street, as quiet as industrial sabotage, or it can consist in the active attempt to recruit others and to persuade them to willingly man barricades or perform acts of sabotage. This situation was before the court in *Scales* Case, *supra*, 367 U.S. 203. This is what "advocacy" means. To hold otherwise and to say that the state cannot prevent this is to fly in the face of every Supreme Court decision in the last ten years.

For the foregoing reasons, it is respectfully submitted that the Petition for a Writ of Cert iorari should be denied.

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County Attorney

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October, 1964

FILE COPY

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

NO. 656

IN THE MATTER OF THE APPLICATION FOR WRIT OF CERTIORARI, by BARBARA ELFBRANDT, *Petitioner,*

vs.

IMOGENE R. RUSSELL, L. E. BOOL and MARTHA L. ELLIOTT, members of the Board of Trustees of Amphitheater Elementary School District No. 10, Pima County, State of Arizona; PAUL J. FANNIN, Governor of the State of Arizona; ROBERT W. PICKERELL, Attorney General of the State of Arizona; JEWEL W. JORDAN, State Auditor; LYNN M. LANEY, O. D. MILLER, SAMUEL H. MORRIS, JOHN G. BABBITT, ELWOOD W. BRADFORD, VIVIAN LAYTI BOYSEN, GEORGE W. CHAMBERS, and LEON LEVY, members of the Board of Regents; W. W. DICK, State Superintendent of Public Instruction, and PAUL J. FANNIN, Governor, ex-officio members of the Board of Regents; FLORENCE REECE, Pima County Superintendent of Schools; ROBERT D. MORROW, Superintendent of Tucson School District No. 1; JACOB C. FRUCHTHENDLER, DELBERT L. SECRIST, NAN LYONS, NORVAL W. JASPER and WILLIAM J. PISTOR, School Board, Tucson District No. 1; RICHARD A. HARVILL, President of The University of Arizona, *Respondents.*

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 168

MISC

IN THE MATTER OF THE APPLICATION FOR WRIT OF CERTIORARI, by BARBARA ELFBRANDT, *Petitioner,*

vs.

IMOGENE R. RUSSELL, L. E. BOOL and MARTHA L. ELLIOTT, members of the Board of Trustees of Amphitheater Elementary School District No. 10, Pima County, State of Arizona; PAUL J. FANNIN, Governor of the State of Arizona; ROBERT W. PICKERELL, Attorney General of the State of Arizona; JEWEL W. JORDAN, State Auditor; LYNN M. LANEY, O. D. MILLER, SAMUEL H. MORRIS, JOHN G. BABBITT, ELWOOD W. BRADFORD, VIVIAN LAYTI BOYSEN, GEORGE W. CHAMBERS, and LEON LEVY, members of the Board of Regents; W. W. DICK, State Superintendent of Public Instruction, and PAUL J. FANNIN, Governor, ex-officio members of the Board of Regents; FLORENCE REECE, Pima County Superintendent of Schools; ROBERT D. MORROW, Superintendent of Tucson School District No. 1; JACOB C. FRUCHTHENDLER, DELBERT L. SECRIST, NAN LYONS, NORVAL W. JASPER and WILLIAM J. PISTOR, School Board, Tucson District No. 1; RICHARD A. HARVILL, President of The University of Arizona, *Respondents.*

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RESPONSE TO APPLICATION FOR WRIT OF CERTIORARI

COMES NOW the respondents herein, appellees below, in Cause No. 7406, Supreme Court, State of Arizona, and make their response to the application for writ of certiorari filed herein on the 10th day of May, 1965.

REFERENCE TO OFFICIAL REPORTS OF OPINIONS IN THE LOWER COURTS

Petitioner herein cites only the latter case in the Arizona Supreme Court. The prior decision is Elfbrandt, et al, v. Russell, et al, 94 Ariz. 1, 381 P.2d 554, on remand 397 P.2d 944.

THE STATUTORY PROVISIONS

Since the petitioner has not set out the provisions of the statute involved verbatim, Rules of the Supreme Court, Rule 40(1)(c), the respondents do so:

CHAPTER 108
House Bill No. 115
AN ACT

RELATING TO CRIMES; TO THE PROTECTION OF THE SAFETY OF THE STATE OF ARIZONA AND THE FUNDAMENTAL LIBERTIES OF ITS CITIZENS FROM THE INTERNATIONAL COMMUNIST CONSPIRACY; PROSCRIPTIONS OF THE COMMUNIST PARTY IN ARIZONA; DEFINING THE CRIME OF SEDITION; REQUIRING LOYALTY OATHS BY PUBLIC OFFICERS AND EMPLOYEES; PRESCRIBING PENALTIES; AMENDING TITLE 16, CHAPTER 2, ARTICLE 1, ARIZONA REVISED STATUTES, BY ADDING SECTIONS 16-205 AND 16-206; AMENDING TITLE 13, CHAPTER 2, ARIZONA REVISED STATUTES, BY ADDING ARTICLE 40.1, SECTIONS 13-707 AND 13-707.01, AND AMENDING SECTIONS 38-231 AND 38-233, ARIZONA REVISED STATUTES.

Be it enacted by the Legislature of the State of Arizona:

Section 1. This act may be cited as the Arizona Communist Control Act of 1961.

Section 2. Title 16, chapter 2, article 1, Arizona Revised Statutes, is amended by adding section 16-205, to read:

16-205. FINDINGS OF FACT AND STATEMENT OF PUBLIC POLICY BY THE LEGISLATURE OF THE STATE OF ARIZONA CONCERNING STEPS WHICH MUST BE TAKEN TO PROTECT THE FUNDAMENTAL RIGHTS OF THE CITIZENS OF THIS STATE AND THE SAFETY OF THIS STATE FROM INTERNATIONAL COMMUNISTIC CONSPIRACY

A. Upon evidence and proof which has been presented before this Legislature, other State Legislatures, the Congress of the United States and in the courts of the United States and in the courts of the several states; and although recognizing that the federal constitution vests the conduct of foreign relations in the federal government and the federal constitution guarantees to the several states a republican form of government and protection against foreign invasion and domestic violence, this state has the duty of self-preservation and the taking of necessary measures to cooperate with the federal government in the preservation of the peace and safety of the State of Arizona and in order to carry out article 2, section 21 of the Arizona Constitution relating to free and equal elections and article 7, section 12 of the Arizona Constitution relating to the enactment of laws to secure the purity of elections; and in order to guard against the abuse of the elective franchise by the Communist Party of the United States which from time to time has qualified as a purported legitimate political party in the State of Arizona; and in order to secure to the citizens of this State their unalienable personal rights and liberty of conscience secured by the provisions of the Constitution of Arizona and in order to protect the peace and safety of the State of Arizona from the overthrow of its constitutional government by force or violence, and of its political subdivisions,

the Legislature of the State of Arizona finds and declares that, unlike other political parties which have evolved their policy and programs through public means, by the reconciliation of a wide variety of individual views, and submit those policies and programs to the electorate at large for approval or disapproval, the policies and programs of the Communist Party are prescribed for it by the foreign leaders of the world Communist movement.

B. The Communist Party members have no part in determining its goals, and are not permitted to voice dissent to party objectives. Unlike members of political parties, members of the Communist Party are recruited for indoctrination with respect to its objectives and methods, and are organized, instructed, and disciplined to carry into action slavishly the assignments given them by their hierarchial chieftains. Unlike legitimate political parties, the Communist Party acknowledges no constitutional or statutory limitations upon its conduct or upon that of its members. The Communist Party is relatively small numerically, and gives scant indication of capacity over to attain its ends by lawful political means. The peril inherent in its operation arises not from its numbers, but from its failure to acknowledge any limitation as to the nature of its activities, and its dedication to the proposition that the present constitutional government of the United States, the governments of the several states, and the government of the State of Arizona and its political subdivision ultimately must be brought to ruin by any available means, including resort to force and violence.

C. The establishment of a totalitarian dictatorship in any country results in the supression of all opposition to the party in power, the subordination of the rights of individuals to the state, the denial of fundamental rights and liberties which are characteristic of a representative form of government, such as freedom of speech, of the press, of assembly, and of religious worship, and said totalitarian dictatorship ruthlessly suppresses academic freedom and inequity into any human knowledge except the official doctrines of the dictatorship. This results in the maintenance of control over the people through fear, terrorism, and brutality.

D. It is the public policy of this state to protect the safety of the constitutional government of the State of Arizona by constitutional means and at the same time protect the rights of the members of our free society to speak, to assemble and to inquire, including the principle of academic freedom which by fostering healthy self-criticism is especially vital in the progress of man's moral values and in man's exploration of the secrets of the atom on this planet and in outer space. To protect the safety of this state and the right of free citizens in a free society to inquire and to understand totalitarianism, it is essential that the schools, colleges and universities teach objectively and critically the governmental and social forms of past and present totalitarian slave states, including the foreign languages spoken therein.

The rights set forth in this subsection do not include the right to embrace Communism or to attempt to persuade others to embrace Communism.

E. The direction and control of the world Communist movement is vested in and exercised by the Communist dictatorship of a foreign country.

F. The Communist dictatorship of such foreign country, in exercising such direction and control and in furthering the purposes of the world Communist movement, establishes or causes the establishment of, and utilizes, in various countries, action organizations which are not free and independent organizations, but are sections of a world-wide Communist organization and are controlled, directed, and subject to the discipline of the Communist dictatorship of such foreign country.

G. The Communist action organizations so established and utilized in various countries, acting under such control, direction, and discipline, endeavor to carry out the objectives of the world Communist movement by bringing about the overthrow of existing governments by any available means, including force or violence if necessary, and setting up Communist totalitarian dictatorships which will be subservient to the most powerful

existing Communist totalitarian dictatorship. Although such organizations usually designate themselves as political parties, they are in fact constituent elements of the world-wide Communist movement and promote the objectives of such movement by conspiratorial and coercive tactics, instead of through the democratic processes of a free elective system or through the freedom-preserving means employed by a legitimate political party which operates as an agency by which people govern themselves.

H. In the United States and in this state those individuals who knowingly and wilfully participate in the world Communist movement, when they so participate, in effect repudiate their allegiance to the United States and this state, and in effect transfer their allegiance to the foreign country in which is vested the direction and control of the world Communist movement.

I. The Communist movement in the several states is an organization numbering thousands of adherents, rigidly and ruthlessly disciplined. Awaiting and seeking to advance at a moment when the several states may be so far extended by foreign engagements, so far divided in counsel, or so far in industrial or financial straits, that overthrow of the Government of the United States and of the several states by force or violence may seem possible of achievement, it seeks converts far and wide by an extensive system of schooling and indoctrination. Such preparations by Communist organizations in other countries, including the recent events in the neighboring country of Cuba, have aided in supplanting existing governments. The Communist organization in the United States and in the several states, pursuing its stated objectives, the recent successes of Communist methods in other countries, and the nature and control of the world Communist movement itself, present a clear and present danger to the security of the government of the United States, the governments of the several states, and the government of the State of Arizona, including its political subdivisions, that make it necessary that the State of Arizona enact appropriate legislation, recognizing the existence of such world-wide Communist conspiracy, and designed

to prevent it from accomplishing its purposes in this State and its political subdivisions. Therefore, the Communist Party should not be permitted to avail itself of the privileges, rights and immunities conferred by law upon legitimate political parties.

Sec. 3. Title 16, chapter 2, article 1, Arizona Revised Statutes, is amended by adding section 16-206, to read:

16-206. PROSCRIPTION OF COMMUNIST PARTY OF UNITED STATES, ITS SUCCESSORS, AND SUBSIDIARY ORGANIZATIONS.

The Communist Party of the United States, or any successors of such party regardless of the assumed name, the object of which is to overthrow by force or violence the government of the United States, or the government of the State of Arizona, or its political subdivisions shall not be entitled to be recognized or certified as a political party under the laws of the State of Arizona and shall not be entitled to any of the privileges, rights or immunities attendant upon legal political bodies recognized under the laws of the State of Arizona, or any political subdivision thereof; whatever rights, privileges or immunities shall have heretofore been granted to said Communist Party of the United States as defined in this section, or to any of its subsidiary organizations, by reason of the laws of the State of Arizona, or of any political subdivision thereof, are hereby terminated and shall be void.

Sec. 4. Title 13, chapter 2, Arizona Revised Statutes, is amended by adding article 40.1, sections 13-707 and 13-707.01, to read:

ARTICLE 40.1 SEDITION

13-707. DEFINITION OF SEDITION; PARTIES; PUNISHMENT

A. A person who knowingly or wilfully commits, or aids in the commission of any act to overthrow by force or violence the government of this state, or of any of its political subdivisions, is guilty of sedition against the State of Arizona.

B. A person who knowingly or wilfully advocates the overthrow by force or violence the government of this state, or of any of its political subdivisions, is guilty of sedition against the State of Arizona.

C. A person who knowingly or wilfully becomes or remains a member of the Communist Party of the United States, or its successors, or any of its subordinate organizations, or any other organization having for one of its purposes the overthrow by force or violence of the government of the State of Arizona, or any of its political subdivisions, and said person had knowledge of said unlawful purpose of said Communist Party of the United States or of said subordinate or other organization, is guilty of sedition against the state.

D. Any person who violates any provisions of this article is guilty of a felony, and upon conviction thereof shall be punished by a fine of not more than twenty thousand dollars, or imprisonment in the state prison for not more than twenty years, or both.

13-707.01. DISQUALIFICATION TO HOLD OFFICE

Any person who is convicted of violating any provision of this article shall automatically be disqualified and barred from holding any office, elective or appointive, or any position of trust, profit or employment with this state, or any political subdivision of this state, or any county, city, town, municipal corporation, school district, public educational institution, or any board, commission or agency of any of the foregoing.

Sec. 5. Sec. 38-231, Arizona Revised Statutes, is amended to read:

38-231. OFFICERS AND EMPLOYEES REQUIRED TO TAKE LOYALTY OATH; FORM; PENALTY

A. In order to insure the statewide application of this section on a uniform basis, each board, commission, agency, and independent office of the state, and of any of its political sub-

divisions, and of any county, city, town, municipal corporation, school district, and public educational institution, shall immediately upon the effective date of this act completely reproduce section 38-231 as set forth herein, to the end that the form of written oath or affirmation required herein shall contain all of the provisions of said section for use by all officers and employees of all boards, commissions, agencies and independent offices.

B. For the purposes of this section, the term officer or employee means any person elected, appointed, or employed, either on a part-time or full-time basis, by the state, or any of its political subdivisions or any county, city, town, municipal corporation, school district, public educational institution, or any board, commission or agency of any of the foregoing.

C. Any officer or employee elected, appointed, or employed prior to the effective date of this act shall not later than ninety days after the effective date of this act take and subscribe the form of oath or affirmation set forth in this section.

D. Any officer or employee within the meaning of this section who fails to take and subscribe the oath or affirmation provided by this section within the time limits prescribed by this section shall not be entitled to any compensation unless and until such officer or employee does so take and subscribe to the form of oath or affirmation set forth in this section.

E. Any officer or employee as defined in this section having taken the form of oath or affirmation prescribed by this section, and knowingly or wilfully at the time of subscribing the oath or affirmation, or at any time thereafter during his term of office or employment, does commit or aid in the commission of any act to overthrow by force or violence the government of this state or of any of its political subdivisions, or advocates the overthrow by force or violence of the government of this state or of any of its political subdivisions, or during such term of office or employment knowingly and wilfully becomes or remains a member of the communist party of the United States or its successors or any

of its subordinate organizations or any other organization having for one of its purposes the overthrow by force or violence of the government of the state of Arizona or any of its political subdivisions, and said officer or employee as defined in this section prior to becoming or remaining a member of such organization or organizations had knowledge of said unlawful purpose of said organization or organizations, shall be guilty of a felony and upon conviction thereof shall be subject to all the penalties for perjury; in addition, upon conviction under this section, the officer or employee shall be deemed discharged from said office or employment and shall not be entitled to any additional compensation or any other emoluments or benefits which may have been incident or appurtenent to said office or employment.

F. Any of the persons referred to in Article XVIII, Section 10 of the Arizona Constitution as amended, related to the employment of aliens, shall be exempted from any compliance with the provisions of this section.

G. In addition to any other form of oath or affirmation specifically provided by law for an officer or employee, before any officer or employee enters upon the duties of his office or employment, he shall take and subscribe the following oath or affirmation:

State of Arizona, County of.....

I, ...do solemnly swear (or
(type or print name)

affirm) that I will support the Constitution of the United States and the Constitution and laws of the State of Arizona; that I will bear true faith and allegiance to the same, and defend them against all enemies, foreign and domestic, and that I will faithfully and impartially discharge the duties of the office of.....
(name of office).....according to the best of my ability, so help me God (or so I do affirm).

.....
(Signature of officer or employee)

Sec. 6. Sec. 38-233, Arizona Revised Statutes, is amended to read:

38-233. FILING OATHS OF RECORD

A. The official oaths of state elective officers shall be filed of record in the office of the secretary of state. The official oaths of all other state officers and employees shall be filed of record in the office of the employing state board, commission or agency.

B. The official oaths of notaries public and of elective county and elective precinct officers shall be filed of record in the office of the county recorder, except the oath of the recorder, which shall be filed with the clerk of the board of supervisors. The official oaths of all other county and precinct officers and employees shall be filed of record in the office of the employing county or precinct board, commission or agency.

C. The official oaths of all city, town or municipal corporation officers or employees shall be filed of record in the respective office of the employing board, commission or agency of the cities, towns and municipal corporations.

D. The official oaths of all officers and employees of all school districts shall be filed of record in the office of the superintendent of public instruction.

E. The official oaths of all officers and employees of each public educational institution except school districts shall be filed of record in the respective offices of said public educational institutions.

F. The official oath or affirmation required to be filed of record shall be maintained as a permanent official record.

Sec. 7. SAVING CLAUSE

This act does not apply to any offense committed prior to the effective date of this act, and any such offense is punishable as provided by the statute in force at the time the offense was committed.

Sec. 8. SEVERABILITY

If any provision of this act or the application thereof to any person or circumstance is held invalid, the invalidity shall not affect other provisions or applications of the act which can be given effect without the invalid provision or application, and to this end the provisions of this act are severable.

Sec. 9. EMERGENCY

To preserve the public peace, health and safety it is necessary that this act become immediately operative. It is therefore declared to be an emergency measure, to take effect as provided by law.

Approved by the Governor—March 30, 1961.

Filed in the Office of the Secretary of State—March 30, 1961.

THE QUESTIONS PRESENTED DO NOT WARRANT REVIEW

The respondents herein, appellees below, do not believe that the petitioner states a case of a nature serious or novel enough to warrant review by this Court. If the issues, facts or arguments raised by petitioner were before this Honorable Court for the first time, respondents admittedly would hesitate urging a denial of the petition. But it is felt that this is not true. The same arguments and issues and virtually the same facts have been presented over and over again to this Court during the past fifteen years and the answers have been the same. The clear and consistent import has been contrary to all the allegations of the petitioner.

STATEMENT OF THE CASE

The statement of the case submitted by petitioner is accurate. However, the petition itself contains several statements of factual matters or possible evidence that were never presented or argued to either the trial court or the Supreme Court. For example, there are factual occurrences outlined on page 23, relative, to the presence of pickets at the Arizona State Capitol. This

was not presented to the trial court and consequently no opportunity was offered to rebut this statement or any implications from any facts alleged if true.*

Of even graver import is the attempt on pages 26, 27 and 28 to introduce purportedly factual evidence of the effect of allegedly similar legislation. None of the cited authorities were presented to the trial court or introduced into evidence. The defendants-appllees had no opportunity to establish whether or not the authors are in fact experts or authorities. Nor was there any opportunity to cross-examine the authors or to present evidence from local sources or elsewhere to rebut whatever conclusions these books might contain.

The Court's attention is also invited to the remarks on page 14, in which reference is made to a former Senator from the State of Arizona and past candidate for the presidency of the United States and in fact to the entire judiciary and bar of the State of Arizona. The provisions of Rule 40(5) of the Rules of the Supreme Court with reference to scandalous matter seem most appropriate.

ARGUMENT

THE PETITIONER MAY NOT CLAIM OF LACK OF ADMINISTRATIVE DUE PROCESS

The petitioner talks at length and at large about "administrative due process." In considering this claim we must first of all put to one side that branch of administrative law which deals with private persons or corporations receiving licenses, permits or the like from regulatory agencies. We are dealing only with employees. But all employees are not in the same status. Some hold positions in which there is a type of civil service job protection granted by statute, while, of course, many others do not have such statutory protection. The right to hold a job only exists if

*In any event it seems hardly consistent for the petitioner to criticize this "right of the people peacefully to assemble, and to petition the Government for a redress of grievances."

there is a statutory (or contractual) grant of such a right. Once a statute exists, however, it becomes part of the contract of employment and may not be disregarded. And once granted there must concurrently exist a remedy in the event that particular right is breached, and a means of enforcement of that particular right. And it also follows that the remedy or means of enforcement must be adequate to do the job necessary and be fair to all concerned.

The next question becomes, who must provide the remedy and where must it be available? The most consistent legislative and congressional answer has been this. If the area of dispute can be handled and adjudicated before the employing agency, board or commission, it is far better for reasons economic, traditional and practical to provide the agency with the machinery to do so. Courts are crowded and often slow. The agencies involved usually prefer to handle personnel matters themselves. In many states restrictive or confusing judicial jurisdictional statutes would defeat a direct remedy in court. But if there exists a judicial remedy as complete as an administrative remedy could be to protect the statutory right, then there is no constitutional, due process need for an administrative remedy. As long as the administrative route or the failure to follow it does not result in any prejudice to the party affected,* a court is at least as competent as an agency to insure due process and to render justice.

Applying this to the present case, we have the following determinations. Does the Arizona Tenure Law, Article 3, Chapter 2, A.R.S. Title 15 apply where the contract is renewed and the teacher not dismissed, but no compensation is paid? If it does apply, and petitioner argues with some reason that loss of salary is just about equivalent to loss of employment, the petitioner by failing to ask for a hearing under the appropriate statute, has not exhausted her administrative remedies.[1] If, however, those pro-

*i.e. The common statutory situation in which the agency determines the facts and the court reviews only for gross abuse of discretion.

[1]Note Justice Jennings' concurring opinion found in 381 P.2d at 566.

visions do not apply we must further consider, (a) is there a judicial remedy adequate to the situation and (b) assuming such a remedy, has there been any prejudice to the petitioner in forcing this route rather than an administrative one? To determine the sufficiency of the remedy it is obviously essential to find out what specific right or rights are at issue. The normal issue in an employee dismissal hearing is whether or not the employee has satisfactorily performed the assigned duties. The normal rights are the rights of the employee to hear the evidence against him and to cross-examine the witnesses as to bad conduct, nonfeasance, negligence, etc. Then there is the further right to present evidence on his own behalf showing good conduct and reputation and generally to rebut the evidence against him. The agency, school board or commission then finds factually whether or not the acts occurred or the facts exist and decides quasi-judicially whether or not punitive measures should be taken.

But no such issue exists here and no such factual determination could have been made in the instant case. Past membership or past advocacy is specifically not an issue to be considered in applying the statute. See Section 7, Chapter 108, *supra.* Even present membership is not a controlling factor. The statute can only be violated by a combination of actual knowledge of the unlawful purpose and actual advocacy of that purpose. In short, an essential fact is the employee's own knowledge of what he himself knows and does. And even if a hearing could show such facts, they would be antecedent to and not violative of the subscription of the oath or affirmation. The agency could find no facts that would have any legal meaning at all. Their area of inquiry is foreclosed to anything prior to the subscription and their power after the subscription is nil. For if a person takes the oath (after such a hearing, if one is held) and thereafter violates it, the sanction is not in the agency involved, but in the criminal courts. What happened at any hearing would be immaterial.

Petitioner suggests that she has a constitutional right to explain and defend a refusal to subscribe to the oath or affirmation. It should be kept in mind at this juncture that the law did not be-

come effective as to offices or employees until ninety days after its effective date. Section 5(c), Chap. 108, *supra.*

Respondents are at a loss to understand how due process requires a person to have an opportunity to explain or defend a refusal to obey a law when the law is clearly mandatory and contains no provisions for excuse. How could the administrative agency afford relief? Or is it urged that due process requires that an employing agency becomes a public or private forum or sounding board? If the law itself is otherwise reasonable and constitutional a party's private resistance, even if based on religious grounds, is utterly immaterial. Assuming the somewhat ridiculous premise that any religion prohibits the making of a simple statement or affirmation of the intention not to attempt to subvert or destroy one's state or employer (and the history of Quakers in this country will show that affirmation as an alternative to oaths exist almost solely because Quakers are willing to make affirmations), the refusal still must result in loss of compensation. For even if a person's religion advocates the practice of polygamy or ritual assassination as the route to salvation, this does not either excuse an individual from choosing between obedience or punishment, or invalidate the law prohibiting such acts. On a less dramatic and more recent plane, we have the Sunday Closing Laws cases.*

Even assuming, however, that a forum for the airing of opinions on the value or applicability of a statute is a constitutional necessity, why should this forum be administrative and not judicial? If the petitioner wishes the opportunity to assault the entire statute, surely the administrative agency was not the place for such a purely legal argument. No agency, commission or school board would be equipped to deal with such a claim or empowered to declare a statute invalid. But a court is so equipped and so authorized. And, in fact, petitioner has done exactly that. She has chosen the best possible place to explain and defend. Neither the state nor

*McGowan v. Maryland, 366 U.S. 420 (1961); Gallagher v. Crown Kosher Super Market, 366 U.S. 617 (1961); Two Guys from Harrison v. McGinley, 366 U.S. 582 (1961); Braunfeld v. Brown, 366 U.S. 599 (1961).

the county nor the school board respondent herein have attempted to deny or to argue against her choice of forum. We have said that the petitioner is incorrect, but we have admitted that the forum, the court, was in the first instance, the place to raise the issues which have been raised. Certainly these claims belong in court and not before a body unequipped by nature and powerless by law to do anything about them.

We should not let off-hand statements concerning "administrative due process' becloud common sense. Administrative *due* process is only important where administrative *process* itself has any value or could result in any real prejudice to the parties involved.

It would thus seem that the conclusion of the Arizona Supreme Court is correct, and that the question of whether or not the Arizona Teacher Tenure Law is applicable to a question of whether loss of compensation constitutes dismissal is not material. If, however, this Court holds that that question of applicability is an issue, that particular issue was not ruled on by the Arizona Supreme Court. If on remand the Arizona Court finds that loss of compensation is equivalent to dismissal, then the petitioner has failed to exhaust her administrative remedy. If the Court on remand finds that the Tenure Law is not applicable to situations involving only loss of compensation, then there never was an administrative remedy in the first place. This would make either (a) the Tenure Law unconstitutional or (b) a judicial remedy available. This remedy could under varying factual situations be in the form of a suit for reformation of contract, an action in quantum meruit, mandamus directing payment of salary, or the route actually chosen by the petitioner and most suited for her particular claim, declaratory judgment as to the validity of the statute. This latter conclsuion is certainly amply sufficient to insure due process as far as the employee is concerned, and the other conclusion does not call into question the statute of which petitioner complains to this Court.

THE LEGAL NEED FOR THE LEGISLATION IS NOT A JUSTICABLE ISSUE, AND HAS BEEN DECIDED BY PRIOR CASES BEYOND DOUBT

The petitioner has contended that the Arizona State Legislature never held hearings or made a report of subversion within the state. The attention of the Court is invited to pages 445, 446 of the Journal of the Senate, First Regular Session of the Twenty-Fifth Legislature of the State of Arizona for the report of the Judiciary Committee. Further findings appear in the preamble, Chapter 108 supra. The report of the Judiciary Committee is attached as appendix 1 hereto. In addition, we certainly have had not only investigations by the Congress of the United States, but trials and convictions of persons accused of subversion, sabotage, etc. It is the opinion of the respondents herein that the State of Arizona is still part of the United States and that activities directed against the constitutional democratic republic in which we live are also directed with equal malice and vigor against the constitutional democratic state in which we live. The courts of Arizona were clearly justified in taking judicial notice of the fact that many industries active in the state are a part and parcel of our national defense system. It is also clear beyond doubt that municipal and state governments bear a heavy primary responsibility for defensive procedures in the event of enemy attack. State and local agencies are directly responsible for the enforcement of criminal laws and have a vital interest in the stability of state governmental institutions and in the proper functioning of state, county and municipal machinery. All that the law in question asks of the people who voluntarily choose to work for the state is that they not attempt to subvert their employers and actively seek to overthrow the institutions of the state in which they live. It seems a bare minimum.

The petitioner also attempts to present to the Court so-called facts as to the effect of the legislation upon the state employees. Joined with this is the standard argument that the law would endanger the freedom of research available to teachers and "preju-

dice a university professor studying the organizational charter of a so-called 'communist subordinate organization.'" (Brief of petitioner, p. 15). One of the handiest ways to attack a statute is to try to make it say what it does not say. The Court's attention is invited to Paragraph D, Section 2, Chapter 108, supra, in which our educational institutions are specifically encouraged and directed to study such documents. The responsends attach as appendix 2 herein, the facts and figures concerning state employment, including employment at educational institutions which was presented as an appendix to the brief in the Arizona Supreme Court. The appendix shows quite clearly that the rate of turnover on state, educational and municipal levels did not change during the first two years of the life of the law, a period in which the greatest degree of change would be expected.

Finally, the question of state legislation and federal legislation in the same area has been presented to this Court time and time again, and never in any instance has this Court listened to an argument that such programs are invalid because there is no reasonable need for them. The clearest holding of this Court in this area is found in Adler v. Board of Education, 342 U.S. 485 (1952).

THE STATUTE IS NOT UNCONSTITUTIONALLY VAGUE

Subsequent to the original decision in this case, this Court ordered the Supreme Court of the State of Arizona to reconsider the legislation in the light of Baggett v. Bullitt, 377, U.S. 360. The Supreme Court of Arizona did so and found in effect in its decision at 397 P.2d 944 that the differences between the statutes involved was so vast and the scope of the Arizona law so clearly within the prior legitimate frames of reference set down by this Court, that Baggett v. Bullitt, supra, was not authority for reversing its earlier opinion in the instant case.

In considering the two cases it would seem to be necessary to discover 1) what exactly in the Washington law was held to be

vague? 2) Is the Arizona law the same or so close as to be indistinguishable for practical purposes? and 3) If there is dissimilarity, are the arguments and reasons of this Court still to be interpolated to fit the Arizona law in such a manner as to render it unconstitutional?

The first infirmity condemned in Baggett v. Bullitt by this Court is found at 277, U.S. 367. "A teacher must swear that. . . . he is not one who commits an act or who *advises, teaches, abets* or advocates by any means. . . ." Later on that same page and continuing to page 368 the following language is found. "Persons required to swear they understand this oath may quite reasonably conclude that any person who *aids* the Communist Party or *teaches* or *advises* known members of the Party is a subversive person because such teaching or advising may now or at some future date aid the activities of the Party."

The Washington law, therefore, proscribes teaching and advising, and those words — teaching and advice — are the words found to be vague. The Arizona law contains no such words. Teaching and advising are not prohibited. Specically A.R.S. § 13-707(A) prohibits the commission or the aiding in the commission of an act to overthrow by force or violence and A.S.R. § 13-707(B) prohibits the advocacy of the overthrow of the government by force or violence.

The Washington law, therefore, is much broader and not only includes abetting, advising or teaching, but assisting in the commission of any such act. R.C.W. 9.81.020(2). The law of the State of Arizona provides that the only aiding or assisting which can be condemned is the aiding or assisting in the commission of an act to overthrow by force or violence. A.R.S. § 13-707(A). To make the contrast even more clear, the act of aiding in the *advocacy* of the overthrow by force or violence is not banned. Only direct advocacy itself is a crime. The Arizona Supreme Court reached this precise conclusion in the second case. See the language of headnote 6 beginning at 397 P.2d 947 through headnotes 8 and 9 on page 948. The act was interpreted in the light of the

normal criminal provisions relating to accessories after the fact.

> "The overt act or the aiding therein must be with actual intent to accomplish the result forbidden, State v. Mandel, 78 Ariz. 226, 278 P.2d 413, and a specific intent to overthrow must exist. It must be an intent in fact which cannot be implied or presumed and must be proved by evidence or facts other than those establishing the overt act. Cf. People v. Snyder, 15 Cal.2d 706, 104 P.2d 639."

and later:

> "In this State there is no distincition between accessories before the fact and the principals. A.R.S. § 13-138. All persons concerned in the commission of a crime, whether they directly committed the act constituting the offense or aid or abet in its commission or, not being present, have advised and encouraged in its commission, are principals. A.R.S. § 13-139. We have construed the aiding required by this statute as a positive act of physical or moral force joining with that of the perpetrator of the crime and producing the result. State v. Martin, 74 Ariz. 145, 245 P.2d 411. The aiding, made punishable by subs. E is the same as that which would make an accessory before the fact a principal under Section 13-139; that is, if the aider is present he must have assisted in the commission of the overt act or, if not being present, have advised *and* encouraged its commission. In a crime where a specific intent is an element there can be no innocent aiding. Acker v. State, 26 Ariz. 372, 266 Pac. 199."
>
> (Emphasis of the Court).

And later:

> "Since both the act and the aiding referred to in the statute must be an attempt with the specific intent to overthrow the government, the Arizona Statute § 38-231 subs. E is not afflicted with the many uncertainties in advising, teaching or associations found potentially punishable in Baggett v. Bullitt, supra. Nor does it reach endorsements or support for Communists candi-

dates for office, nor a lawyer who represents the Communist Party or its members, nor journalists who defend the Communist Party, its rights, or its members. Such conduct is neither an act nor in aid of an act attempting to overthrow the government by force and violence."

This Court in Baggett v. Bullitt went on to consider what it termed an additional difficulty on page 369 of 377 U.S.

"A person is subversive not only if he himself commits the specified acts but if he abets or advises another in aiding a third person to commit an act which will assist yet a fourth person in the overthrow or alteration of constitutional government."

It is felt that an analysis of this "additional difficulty" will show it is merely an extension of the first ground and arose by virtue of the same words, to-wit: aid and teach. To be quite accurate the Washington law does not use the word "aid" in any other way than as part of the phrase "aid in the commission of". But the law does specifically condemn one who abets another and the meaning of abet is so close to the meaning of aid that the substitution of one one word for another in the opinion is not unreasonable, although it is occasionally confusing.

But as the Arizona Supreme Court has clearly pointed out the Arizona law does not go nearly as far, and is in fact confined to those acts which would, even without the statutory phraseology, give rise to a charge only where the person involved is an accessory before the fact. There are no hidden traps in the Arizona law. No "guiltless knowing behavior" can be envisioned as punishable.

This Court further critized the Washington law for some specific language which bears absolutely no relation to any language in the Arizona law. Specifically there was criticism of the phrase "alteration of . . . . by revolution, force or violence: . . . .". We agree with the language of the Supreme Court on this subject that the Washington statute is quite vague. We further agree with the language of this Court concerning the Washington "1931 Oath". But once again there is absolutely no parallel in the Ari-

zona law, nor any language even remotely resembling the Washington Code. As the Supreme Court of Arizona pointed out:

> "The Arizona Oath, with insignificant changes, has been used in the territory and the State of Arizona for over 100 years. An oath of allegiance in part couched in nearly identical language is required by Congress of those seeking citizenship by naturalization. Plainly, the Arizona Oath is no more than a re-statement of the duties of citizenship, an express engagement to which all who are afforded the protective cloak of the Constitution and the laws of this Country and State are irrevocably bound." 397 P.2d 945, 946.

The Court then went on to discuss some specific language of the Oath and held as follows:

> "We recognize that the words 'true faith and allegiance', 'defend', and 'faithfully and impartially' in the context in which they are used range high in the level of abstractions. But Arizona's general perjury statute A.R.S. § 13-561 has no application for the act contains an enumeration of the offenses punishable criminally as perjury, A.R.S. § 38-231, subs. E. A statute which enumerates the subjects or things upon which it is to operate will be construed as excluding from its effect all those not especially mentioned. Lewis v. Industrial Commission, 93 Ariz. 324, 380 P.2d 782. No criminal act is committed under the specific language of the oath if the taker is unfaithful, partial, divides his allegiance or fails to defend the Constitution and laws against all enemies. The test is wholly subjective, binding only to the extent of the individual's conscience."

Once again the language of our Supreme Court, which has become a part of the law as this Court has heretofore recognized in numerous instances, is clear and persuasive on the subject and ends any doubt as to the issue.

Finally petitioner again maintains that certain words such as "knowingly", "wilfully" and "advocacy" or "membership" could be held to be vague. In the prior opinion of the Arizona

Supreme Court, it was held that the language of this Court in cases such as Scales v. United States, 376 U. S. 203 (1961); Yates v. United States, 354 U.S. 298 (1957); Dennis v. United States, 341 U.S. 494 (1951) would be binding as an interpretation of the law in the State of Arizona. The Judiciary Committee of the Senate in its report noted that it had considered the decisions of this Court in drafting the legislation. And since the Arizona Supreme Court in its decision specifically incorporated the provisions of these three cases into Arizona law, the argument of the petitioner in this area is judicially untenable.

THE LEGISLATION IS NOT A BILL OF ATTAINER

The language of the Supreme Court of Arizona is most appropriate:

> "The attacks directed against this oath question nearly every conceivable constitutional aspect. Not all merit serious consideration.'

Communist Party v. Subversive Activities Control Board, 367 U.S. 1 (1961) and *Scales v. United States, supra,* are clear answers to petitioner's contention.

THE EQUAL PROTECTION CLAUSE IS NOT VIOLATED

This question has been answered beyond any doubt by *Adler v. Board of Education, supra.*

THERE IS NO VIOLATION OF THE FIFTH AMENDMENT

As pointed out above there is no attempt to penalize or punish past activities, nor is anyone required to divulge past activities or associations.

FREEDOM OF SPEECH OR ASSOCIATION IS NOT A VALID ISSUE

This Court has in the past in a series of well-known cases considered the question of loyalty oaths and legislation directed against advocacy of the overthrow of government by force or violence. The universal import of such cases is that such legislation is reasonable. American Communications Association v. Douds, 339 U.S. 382 (1950); Dennis v. United States, supra; Adler v. Board of Education, supra; Communist Party v. Subversive Activities Control Board, supra, Yates v. United States, supra; Garner v. Board of Public Works of Los Angeles, 341 U.S. 716 (1951); Gerende v. Board of Supervisors of Elections, 341 U.S. 56 (1951). There have been three cases which have struck down such legislation. One is Wieman v. Updegraff, 344 U.S. 183 (1952). In that case the legislation was interpreted by the Supreme Court of Oklahoma as not requiring any knowledge of the unlawful purpose or activities of a prior association. The legislation in issue has been more than careful in avoiding such a pitfall. The next case was the Florida case of Cramp v. Board of Public Instruction, 368 U.S. 78. The Oath involved therein had, among its provisions the phrase that "I have not and will not lend my aid, support, advice, counsel or influence to the Communist Party." It was this precise phrase that drew this Court's condemnation and it was this section alone that was considered. Even ignoring that portion which relates to past activities it can be readily seen that the language of the law is vague on its face. There is not one word or phrase which this Court condemned in the Florida case which can be found directly or by any stretch of the imagination in our Arizona law.

The third case involving a State law is Baggett v. Bullitt, supra, in which the Supreme Court makes it clear that the differences are so great that there can be no valid comparison.*

*We omit Dombrowski v. Pfister, No. 52, October Term 1964, decided April 26, 1965, as only certain sections of the Louisiana law, none of which bear any resemblance to Arizona law, were considered.

CONCLUSION

It is submitted that the legislation in question is a dedicated and intelligent effort to balance both the rights of individuals and the needs of the society in which we live in these somewhat troubled times. It is further submitted that no legislation on record has gone so far and has been directed so consistently towards the protection of individual rights and liberties as the legislation which is presently before the Court. It is further submitted that every decision of the Court in the area is so clear and consistent that there is no reason why review should be granted in the instant case.

Respectfully submitted,
DARRELL F. SMITH
The Attorney General

PHILIP M. HAGGERTY
Assistant Attorney General
State of Arizona
159 Capitol Building
Phoenix, Arizona
Counsel for Respondents.

APPENDIX 1

Wednesday, March 15, 1961
Sixty-sixth Day

JOURNAL OF THE SENATE

The Senate accepted for inspection in the Journal, at the time of third reading of House Bill No. 115, the intent of the Senate in support of the bill, as follows:

REPORT OF THE JUDICIARY COMMITTEE IN SUPPORT OF THE COMMITTEE AMENDMENT TO H. B. 115

(The proposed committee amendment also covers the same material contained in H. B. 35 with certain material differences.)

A free society must be dedicated to the protection of the individual from government oppression. The American dream is that these rights inhere in any man. They are not revocable privileges bestowed by governments, either totalitarian or free. These human rights are unalienable. Among the most precious are the freedom to speak, to assemble, to organize political parties, to vote for governmental representatives, and to petition these elected officers.

These rights in the schools become the principle of academic freedom which fosters self-criticism and intellectual skepticism—qualities vital ot the pursuit of truth. This freedom to learn how to think objectively is especially important in man's exploration of the secrets of the atom on this planet and in outer space.

These liberties withstood the test of repeated attacks by German and Japanese totalitarianism. Now, these same liberties are under attack by a Russian Imperialism likewise intent on world domination by external force, internal incitement to violence, fraud, espionage and fifth column treachery. The Communist Party in this Country must be recognized as an instrument of a foreign power and as part and parcel of an international scheme

to destroy unalienable human rights by substituting a world wide communistic dictatorship subservient to foreigners.

The totalitarian enemy is skilled in the fomenting of confusion and panic with resulting insecurity and distrust. Citizens of a free society then begin to wonder whether that free society whose citizens have unalienable rights to speak critically can compete successfully with the totalitarian society consisting wholly of conforming, silent slave citizens rules by a ruthless autocracy.

National security demands effective action against any group of citizens, communists or otherwise, whose basic loyalty is to a form of foreign totalitarian domination which seeks to destroy the immemorial rights of the citizens of a free society. America must keep devising remedial measures sufficient in scope and strength to deal adequately with the evil of Communist statism. However, it would be ironically tragic if, in the process of fighting totalitarianism, we undermined the very principles of human dignity and freedom which the communist seek to destroy.

The fight against international communism must be on a national scale because the Constitution has delegated exclusive management of foreign affairs to the Federal Government. The Executive and Legislative Branches of that government must give effective leadership through the Federal Bureau of Investigation and the Central Intelligence Agency, to the several States and their citizens as to how best to preserve and protect the human rights to Life, Liberty and the Pursuit of Happiness proclaimed by the Declaration of Independence and guaranteed by the Federal Constitution.

It is a sign of hysteria and an indication of that very distrust of the United States, which the communist seeks to foment, when each State seeks to devise some special oath of allegiance which is supposed to divide the communist from the loyal citizen. The communist trained in fraud and perjury has no qualms in taking any oath; the loyal citizen, conscious of his tory's oppressions, may well wonder whether the medieval rack and torture wheel are next for the one who declines to take an involved negative oath as

evidence that he is a True Believer. Loyalty to a free society is a matter of fact; nor are there degrees of loyalty to human freedoms which are in direct proportion to ingenuity, length and loudness of the loyalty oath. In fact, a communist commits perjury in taking the simplest affirmative oath to support the Constitution of the United States and that of Arizona.

Accordingly, your committee reports and recommends for passage H.B. 115 as amended by this committee. The proposed amendment outlaws the Communist Party in Arizona, defines the crime of sedition, requires an affirmative loyalty oath from all state and local officers and employees, and provides, in effect, that any person signing such an oath who is a member of the Communist Party or any organization committed to the overthrow by force or violence of our constitutional government shall be punished as if he had committed perjury. No attempt has been made to include special provisions for forfeiture of property or for special searches and seizures. These matters are already covered by existing law or raise serious constitutional questions which might invalidate the entire act.

Section 5 paragraph F of the bill as amended by the Committee exempts from the loyalty oath those persons referred to in Article XVIII, Section 10 of the Arizona Constitution as amended. This exemption relates wholly to the working of alien prisoners on work gangs and the employment of aliens under the teacher exchange program authorized by the Congress of the United States. The federal statute is to be found in Title 22, USCA, "Foreign Relations and Intercourse", Section 1446. This Section provides in part as follows: "* * * a person admitted under this section * * * who engages in activities of a political nature detrimental to the interests of the United States, or in activities not consistent with the security of the United States, shall upon the warrant of the Attorney General, be taken into custody and promptly deported pursuant to sections 1251-1253 of Title 8 * * *". In any event, it would be improper to request a French or German national who had been cleared to teach temporarily in the United States to take

a loyalty oath to the United States. If he did, he might lose his native citizenship just as an American visiting teacher abroad might lose his American citizenship if he took a loyalty oath to a foreign country.

An attempt has been made to objectively study the several federal and state statutes relating to the Communist Party, sedition, and loyalty oaths as well as the various federal and state court decisions (usually thinly divided opinions), interpreting the constitutional questions involved. Based upon the foregoing, the committee amendment plainly recognizes the international communist menace, devises remedial measures on a state level to meet it, and yet does not unduly restrict the very liberties of a free citizen in a free society which communist statism would destroy.

APPENDIX 2

Feb. 23 '62
(Stamp)
ATTORNEY GENERAL
STATE OF ARIZONA
February 16, 1962

Hon. Robert W. Pickrell
The Attorney General
State of Arizona
State Capitol Building
Phoenix, Arizona

Dear Mr. Pickrell:

As the Director of personnel of the City of Phoenix, I hereby certify to your office the number of employees employed by the City of Phoenix during the past two (2) fiscal years and the number of employees who have left employment during the same periods. It is to be noted that this list does not include part-time workers (mostly help in the City Parks), but does include all City employees including police and fire department personnel. For the fiscal year commencing July 1, 1959 and ending June 30, 1960, the average number of employees employed by the City of Phoenix was 2,764. During the same period 375 employees left the service of the City of Phoenix. For the fiscal year commencing July 1, 1960 and ending June 30, 1961 the average number of employees employed by the City of Phoenix was 3,295. During the same period of time 325 employees left the employ of the City of Phoenix.

Very truly yours,
/s/LEROY J. BRENNEMAN
Personnel Director

(SEAL)

ATTEST:
/s/M. B. BARTLET
Notary Public 2-21-62
My Commission Expires Sept. 27, 1962
(SEAL)

ARIZONA STATE RETIREMENT SYSTEM
PHOENIX 30, ARIZONA

Feb. 26 '62
(STAMP)
ATTORNEY GENERAL
STATE OF ARIZONA

February 19, 1962

Honorable Robert W. Pickrell
The Attorney General
State of Arizona
State Capitol Building
Phoenix, Arizona

Dear Mr. Pickrell:

This letter summarizes records of the Retirement System for the past two years, reporting how many employees are employed in those public offices covered by the State Retirement System and how man employees leave the System each fiscal year.

These records reflect the number of persons who withdraw money from the Retirement System. If they later became employed with another public body, this would not be reflected in our statistics. This record does not show the people who actually left, but merely those who withdrew their retirement funds. Some persons leave these funds in for varying lengths of time and then withdraw them. These figures show the number who withdrew funds.
These statistics exclude persons who have died during the course of the year and the funds were paid to their beneficiary, and also exclude those who have actually retired and are drawing retirement benefits. The list also does not include members of any municipal fire department or state or county judiciary retirement system.

We enclose copies of the Annual Reports for the Retirement System, one for the fiscal year ending June 30, 1960 and the second for the fiscal year ending June 30, 1961. Note from the report on the page headed "Arizona State Retirement System

Membership" that we list all political subdivisions who had then established State System membership for their personnel. Note also such membership supplements the membership entitlement granted by the Legislature to all state employees, including the Universities and the State College and certificated school personnel. Names preceded by asterisks note that membership was established as of July 1, 1960 as noted in the report for the fiscal year ending on that date, and that an asterisk precedes a subdivision establishing membership July 1, 1961, as noted in the report issued on that date. Such membership data typically does not include the employee with less than 90 days' service and note that the number of retired members are separately stated.

For the fiscal year concluding June 30, 1960, 4,257 former employees had concluded employment with the state, a school system or a covered political subdivision and withdrew their funds from, and cancelled their membership in, the Arizona State Retirement System. For the fiscal year concluding June 30, 1961, 4,311 former employees had concluded employment with the state, a school system or a covered political subdivision and withdrew their funds from, and cancelled their membership in, the Arizona State Retirement System.

Sincerely,

/s/WAYNE R. GIBSON
Wayne R. Gibson
Director

ATTEST:
/s/CAROL L. DUFF

My Commission Expires Aug. 22, 1965
(SEAL)

Subscribed and sworn to before me this 19th day of February, 1962.

ARIZONA STATE RETIREMENT MEMBERSHIP
1959-1960

All State Employees—including the Universities and College 10,736

School Employees—all teachers in Arizona and the non-teaching employees of the following schools:.... 16,039

Cochise County
- Bisbee Schools
- Douglas Schools
- Wilcox Schools

Coconino County
- Flagstaff Schools
- Williams Schools

Gila County
- Globe Schools
- Miami Schools

Graham County
- Eastern Arizona Junior College

Greenlee County
- Clifton Schools

Maricopa County
- Arlington No. 47
- Alhambra No. 68
- Buckeye Union H. S.
- Cartwright No. 83
- Creighton No. 14
- Fowler No. 45
- Glendale No. 40
- Glendale Union H.S.
- Isaac No. 5
- Liberty No. 25
- Litchfield No. 79
- Madison No. 38
- Paradise Valley Schools
- Phoenix No. 1
- Phoenix Union H. S.
- Riverside No. 2
- Roosevelt No. 66
- Scottsdale Schools
- Tempe Union H. S.
- Washington No. 6
- Wickenburg Schools

Navajo County
- Winslow Schools

Pima County
- Amphitheater Schools
- Marana Schools
- Sahuarita Schools
- Sunnyside Schools
- Tucson Schools

Pinal County
- Casa Grande No. 4
- Stanfield Schools
- Toltec No. 22

Yavapai County
- Prescott Schools
- Verde No. 3

Yuma County
- Yuma No. 1
- Yuma Union H.S. 6,763

Political Subdivisions

County Employees
- Cochise
- Coconino
- Graham
- Greenlee
- Maricopa
- Mohave
- Pima
- Pinal
- Santa Cruz
- Yavapai

City and Town Employees
- Avondale
- Chandler
- Casa Grande
- Douglas
- Flagstaff
- Gilbert
- Glendale
- Goodyear
- Kingman
- Mesa
- Prescott
- Tempe
- Tolleson
- Williams
- Yuma

Flagstaff Housing Authority
Maricopa County Water Conservation District
Pima County Sanitary District

Total Active Members	33,538
Inactive — one year	1,948
Total member accounts	35,486
Retired Members	1,097
Total	36,583

/s/WAYNE R. GIBSON
Wayne R. Gibson
Director

ATTEST:
/s/CAROL L. DUFF
(SEAL)
My Commission Expires Aug. 22, 1965

ARIZONA STATE RETIREMENT MEMBERSHIP
1960-1961

All State Employees—including the Universities and College	11,526
School Employees—all teachers in Arizona and the non-teaching employees of the following schools	18,014

Cochise County
- Benson Schools
- Bisbee Schools
- Douglas Schools
- Wilcox Schools

Coconino County
- Flagstaff Schools
- Grand Canyon Schools
- Williams Schools

Gila County
- Globe Schools
- Miami Schools

Graham County
- Eastern Arizona Junior College

Greenlee County
- Clifton Schools

Maricopa County
- Arlington No. 47
- Alhambra No. 68
- Avondale No. 44
- Buckeye Union H.S.
- Cartwright No. 83
- Creighton No. 14
- Fowler No. 45
- Glendale No. 40
- Glendale Union H.S.
- Isaac No. 5
- Liberty No. 25
- Litchfield No. 79
- Madison No. 38
- Paradise Valley Schools
- Phoenix No. 1
- Phoenix Union H.S.
- Riverside No. 2
- Roosevelt No. 66
- Scottsdale Schools
- Sierra Vista No. 97
- Tempe Union H.S.
- Washington No. 6
- Wickenburg Schools

Navajo County
- Winslow Schools

Pima County
- Amphitheater Schools
- Marana Schools
- Sahuarita Schools
- Sunnyside Schools
- Tanque Verde No. 13
- Tucson Schools

Pinal County
- Casa Grande No. 4
- Mammoth-San Manuel Schools
- Stanfield Schools
- Toltec No. 22

Yavapai County
- Bagdad Schools
- Mingus Union H.S.
- Prescott Schools
- Verde No. 3

Yuma County
- Yuma Union H.S. 7,008

Political Subdivisions

County Employees

Cochise	Navajo
Coconino	Pima
Graham	Pinal
Greenlee	Santa Cruz
Maricopa	Yavapai
Mohave	Yuma

City and Town Employees

Avondale	Mesa
Chandler	Prescott
Casa Grande	Safford
Douglas	Scottsdale
Flagstaff	Tempe
Gilbert	Tolleson
Glendale	Williams
Goodyear	Yuma
Kingman	

Flagstaff Housing Authority

Flood Control District of Maricopa County

Maricopa County Water Conservation District

Pima County Sanitary District

Total Active Members	36,548
Inactive — one year	1,166
Total Member Accounts	37,714
Retired Members	1,283
Total	38,997

/s/WAYNE R. GIBSON
Wayne R. Gibson
Director

ATTEST:
/s/CAROL L. DUFF
(SEAL)
My Commission Expires Aug. 22, 1965

ILE COPY

Office-Supreme Court, U.S.
FILED
JAN 1 5 1966
JOHN F. DAVIS, CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. 656

BARBARA ELFBRANDT,

Petitioner,

vs.

IMOGENE R. RUSSELL, *et al.*

PETITIONER'S BRIEF

W. EDWARD MORGAN
Attorney for Petitioner
45 West Pennington,
Suite 407
Tucson, Arizona

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. 656

BARBARA ELFBRANDT,

Petitioner,

vs.

IMOGENE R. RUSSELL, *et al.*

PETITIONER'S BRIEF

a) Reference to the Official and Unofficial Reports of the Opinions Delivered in the Courts Below:

Elfbrandt v. *Russell,* 397 P. 2d 944 and 381 P. 2d 554.

b) Concise Statement of Grounds on Which the Jurisdiction of This Court Is Invoked:

The jurisdiction of this Court is invoked by reason of fact that the petitioners allege that the statute in question violates the United States Constitution for various reasons hereinafter set forth and that the Supreme Court of the State of Arizona erred in affirming the Constitutionality of such statute as it applies to the petitioners and others similarly situated.

(i) The original judgment in the Supreme Court of the State of Arizona was May 1, 1963. Petitioner filed a Motion for Rehearing and the State Supreme Court denied same on May 28, 1963.

(ii) The petitioner then filed an original Application for Writ of Certiorari in the United States Supreme Court, which was submitted on August 16, 1963, and was given No. 553 Misc. October Term, 1963. The United States Supreme Court granted the Writ of Certiorari and on June 15, 1964, remanded the case back to the Arizona State Supreme Court for review of its original decision in light of the U.S. Supreme Court case in the matter of *Baggett* v. *Bullitt,* 12 L. Ed. 2d 377. This action on the part of the United States Supreme Court was reported in 378 U.S. 127, 84 S. Ct. 1658 and 12 L. Ed. 2d 744.

Thereafter, the Petitioner filed her second brief in the State Supreme Court, with the State filing responsive brief. Oral argument was heard before the State Supreme Court and on December 30, 1964, the State Supreme Court issued its Opinion affirming its prior decision and denying Petitioner relief. On January 29, 1965, Petitioner filed a Motion for Rehearing before the State Supreme Court of Arizona and this Motion was denied on February 17, 1965.

Within the 90-day time period set forth in Rule 22 of the Rules of the Supreme Court of the United States, to-wit: On May 10, 1965, Petitioner filed Application for a Writ of Certiorari and for leave to proceed in forma pauperis. On October 11, 1965, the Court entered its Order granting leave to proceed in forma pauperis and the petition for Writ of Certiorari was granted.

c) Constitutional Provisions, Treaties, Statutes, Ordinances and Regulations Which the Case Involves:

The statutory provision believed to confer upon this Court jurisdiction to review the judgment in question by Writ of Certiorari is Article III, Par. 1, United States Constitution, 28 U.S.C.A., Par. 1257:

"Final judgments or decrees rendered by the highest court of a state in which a decision would be made be reviewed by the Supreme Court as follows: . . .

(3) By Writ of Certiorari where the validity of a treaty or statute of the United States is drawn in question on the grounds of its being repugnant to the Constitution, treaty, or laws of the United States or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States."

The Constitutional provisions involved are the First Amendment to the United States Constitution, Fifth Amendment to the United States Constitution, Sixth Amendment, and Fourteenth Amendment, Article I, Section 10. Texts of these provisions of the United States Constitution are set forth verbatim in appendix annexed hereto. 38-231, Chap. 2, Title 38, A.R.S. 1956, set forth hereafter in the appendix.

d) Questions Presented for Review:

Re the Sixth Amendment to the U.S. Constitution:

Is the Arizona statute (38-231, Chap. 2, Title 38, A.R.S. 1956) a statute defining a crime within the purview of the meaning of the Sixth Amendment to the U.S. Constitution, by reason of its providing:

a) A penalty for false swearing;

b) A necessity for an oath and the danger of being placed in jeopardy for purported false swearing;

c) A statute providing a standard of conduct on the part of the employees of the State of Arizona and other gov-

ernmental agencies of the State, subject to administrative regulation?

And, if the statute comes within the purview of the mandate of the Sixth Amendment to the U.S. Constitution, is its language so vague:

a) That men of common intelligence must necessarily guess at its meaning?, or

b) That it fails to unequivocally warn the prospective State employee of the type of conduct which can be the occasion for depriving him of his liberty or property?, or

c) That the definition of the standard of conduct which is the subject of administrative regulation is so indefinite as to not provide a standard of conduct, by reason of its wording: calling upon the employee to not "knowingly", "willfully", "commit or aid", "advocate the overthrow", or "knowingly or willfully become or remain a member of the Communist Party" or a "successor organization of the Communist Party" or "a subordinate organization of the Communist Party" or have "knowledge of unlawful purpose"—all terms of this statute with which one must be familiar and on the basis of which terms one must swear.

Bill of Attainder (Article I, Section 10, U.S. Constitution):

Whether or not the statute is a Bill of Attainder and forbidden under Article I, Section 10 of the U.S. Constitution, in that as the statute demands of any public employee within the State, before he may receive remuneration, that he sign an oath negating his affiliation at that point and for the future with the proscribed organizations; and automatically, upon the failure to sign the oath, the particular employee is proscribed and without salary.

Violation of the Fifth Amendment to the U.S. Constitution:

Whether or not the statute, in not granting a person a trial or hearing and, where he is already employed, having him sign an oath for continued remuneration, is not in effect a method of forcing the person to incriminate himself and therefore violative of the Fifth Amendment to the U.S. Constitution.

Equal Protection of the Laws Guaranteed Under the Fourteenth Amendment:

Whether or not the statute, by making its provisions applicable only to public employees or State employees of one type or character, and not applicable to all citizens, and therefore placing a higher burden unjustifiably on one part of the citizenry than another, therefore violates the Equal Protection of the Laws guaranteed by the Fourteenth Amendment to the U.S. Constitution;

And if it does so discriminate unequally, whether or not there would appear to be legally sufficient distinction between the danger to the State from subversion by its general citizens as opposed to danger to the State from subversion by its public employees, as to warrant the distinction in treatment as provided for by the statute,

And therefore whether it does not in effect violate the equal protection of the laws guarantee of the Fourteenth Amendment to the U.S. Constitution?

Due Process under the Fourteenth Amendment to the U.S. Constitution and *Freedom of Speech and Assembly* under the First Amendment to the U.S. Constitution:

Whether or not the statute, by not providing any form of hearing on the issue of loyalty, and denying to public em-

ployees remuneration upon failure to take the oath, is a violation of the Due Process guarantees of the Fourteenth Amendment to the U.S. Constitution as:

1. A taking of property;

2. A violation of Freedom of Speech and Assembly as guaranteed by the First Amendment to the U.S. Constitution.

Violation of Freedom of Speech and Assembly:

That, whereas there were no legislative findings, or inadequate legislative findings, to justify the Legislature's infringing upon the rights of the petitioners to Freedom of Speech and Assembly under the First Amendment to the U.S. Constitution; and

Whereas the legislation would appear to be ineffectual for any of the purposes that it would purportedly answer and the damage arising by its application to the Petitioner and all persons similarly situated would, to the body politic, be so great;

The Legislature did not and does not have sufficient legislative reason to invade the Constitutional rights of Freedom of Speech and Freedom of Assembly of the Petitioners.

Whether or not the definition of illegal advocacy as being proscribed under the State statute is so broadly worded as to constitute a violation of Freedom of Speech and Assembly and to deny that type of advocacy of forceful overthrow of the Government which is Constitutionally protected under the pertinent provisions of the United States Constitution, with particular reference to the definition of the Constitutional protection of certain forms of advocacy

of the forceful overthrow of the Government as set forth in *Baggett* v. *Bullitt, supra.*

e) Concise Statement of the Case:

This is an action brought by the plaintiff, Barbara Elfbrandt, for herself and for all others similarly situated; in other words, a class action on behalf of all persons subject to the effect of the pertinent statute, to-wit: 13-707 A.R.S., 13-707.1 A.R.S. and Section 38-231 A.R.S. The complaint was brought in the Superior Court of the State of Arizona in and for the County of Pima. An original Petition for Temporary Restraining Order and Orders to Show Cause and Injunction was requested and each denied by subsequent court action. (See Transcript of Record, U.S. Supreme Court, pages 2-13.) The trial of the action on the complaint was determined by the trial court upon a Transcript of Stipulations and Statement of Fact. (See Transcript of Record, U.S. Supreme Court, pages 36-37.)

The question provided by the complaint and the stipulations was whether or not Section 38-231, Chapter 2, Title 38 A.R.S. was constitutional under the pertinent Constitutional guarantees of the Federal and State Constitutions. The trial court determined the issue adversely to the plaintiff and decided that the pertinent statutes were in fact Constitutional. From this decision, the plaintiff appealed to the Supreme Court of the State of Arizona.

After submission to the Supreme Court of the State of Arizona, by brief and oral argument, that Court affirmed the Constitutionality of the statute against all attacks raised by petitioner on all U.S. Constitutional grounds raised.

Subsequent to the decision of the State Supreme Court, petitioner filed a Motion for Rehearing which was denied.

Subsequently, petitioner applied for an original Writ of Certiorari to the U.S. Supreme Court, which Writ was granted. The United States Supreme Court remanded the matter to the Supreme Court of the State of Arizona for review by that court of its decision in light of a subsequent Constitutional ruling in the area of the contested matter, as set forth in the United States Supreme Court's decision in *Baggett* v. *Bullitt, supra.* (See Transcript of Record, U.S. Supreme Court, page 68.)

In compliance with the Order of the United States Supreme Court, the Arizona State Supreme Court requested counsel, including the American Civil Liberties Union, to file briefs. The briefs were filed by the Petitioner and by the American Civil Liberties Union and by counsel for the State of Arizona; oral argument was held before the State Supreme Court; and the State Supreme Court affirmed its previous decision denying all attacks of lack of Constitutionality of the statute in question and affirming its previous decision. (See Transcript of Record, U.S. Supreme Court, page 71.) Petitioner then filed a timely Motion for Rehearing before the State Supreme Court and on February 17, 1965, the Arizona State Supreme Court denied Petitioner's Motion for Rehearing. From this course of decisions, Petitioner renewed her application for Writ of Certiorari, filing same on May 10, 1965. Certiorari was granted by this Court on October 11, 1965.

f) Argument and Conclusion:

In 1961, the 25th Legislature of the State of Arizona passed Arizona Revised Statute 38-231, demanding that every employee of every board, commission, agency and independent office of the State and any of its cities, towns,

school districts and public institutions should from that point on not pay any more salary to any employee who failed or refused to sign a disclaimer oath, in the following words:

"State of Arizona, County of .....

I, (type or print name) do solemnly swear (or affirm) that I will support the Constitution of the United States and the Constitution and laws of the State of Arizona; that I will bear true faith and allegiance to the same, and defend them against all enemies, foreign and domestic, and that I will faithfully and impartially discharge the duties of the office of (name of office) according to the best of my ability, so help me God (or so I do affirm).

.....

(Signature of officer or employee)"

However, the *meaning* of the oath is set forth in Section E of the particular statute, to-wit:

"Any officer or employee as defined in this section having taken the form of oath or affirmation prescribed by this section, and knowingly or wilfully at the time of subscribing the oath or affirmation, or at any time thereafter during his term of office or employment, does commit or aid in the commission of any act to overthrow by force or violence the government of this state or of any of its political subdivisions, or advocates the overthrow by force or violence of the government of this state or of any of its political subdivisions, or during such term of office or employment knowingly

and wilfully becomes or remains a member of the Communist Party of the United States or its successors or any of its subordinate organizations or any other organization having for one of its purposes the overthrow by force or violence of the government of the State of Arizona or any of its political subdivisions, and said officer or employee as defined in this section prior to becoming or remaining a member of such organization or organizations had knowledge of said unlawful purpose of said organization or organizations, shall be guilty of a felony and upon conviction thereof shall be subject to all the penalties for perjury; in addition, upon conviction under this section, the officer or employee shall be deemed discharged from said office or employment and shall not be entitled to any additional compensation or any other emoluments or benefits which may have been incident or appurtenant to said office or employment."

When faced with this legislation, Barbara Elfbrandt, a teacher and Quaker, joined together with other teachers and other public employees to discuss whether in good conscience she or they could sign such an oath, given such a meaning and interpretation by the Legislature. The statute provided for no hearing or any method to get a hearing to determine whether one was loyal or not loyal. With the attendant legislation passed at the same time, to-wit: "The Communist Control Act", Title 14, Chap. 2, Art. 1, A.R.S. 1956, 16-205 and 16-206 (see Appendix for statement), it was clear that in good conscience a great number of people could not sign the oath, with the interpretation provided by the Legislature: not on the basis of a conscionable belief that they were members of any organization that could

clearly be defined as "Communist", but on the basis that as intelligent persons they could not know what the Legislature intended to cover. To submit to a possible perjury prosecution before an unknown jury in a State whipped by Barry Goldwater right-wing Birchite "hard-core" Americanism, would leave one to the gentle mercies of such "juries" in defining "membership", "knowing membership", "affiliated membership", "acts to aid or abet the overthrow by force of the government". One could not in good conscience put oneself in such jeopardy.

This Court should declare the Arizona Statute unconstitutional for the first and prime reason that the Arizona statute, as presently constituted, is a denial of procedural Due Process as guaranteed by the Fourteenth Amendment to the U.S. Constitution, in that no hearing is provided before termination of a public employee's salary upon his refusal, for any reason, to sign the oath demanded by the Legislature. This legislation was adopted without any public hearing.

The Legislation Is a Violation of the Guarantee of Procedural Due Process

The concept of due process cannot be expressed in precise terms. Broadly speaking, it denotes our sense of what constitutes fairplay in the legal procedures under which a man is tried. *Galvan* v. *Press,* 1954, 347 U.S. 522, 74 S. Ct. 737, 98 L. Ed. 911. Expressed in terms of the relief provided by the writ of habeas corpus it is said that the scope of the writ 'is largely a reflection of our contemporary attitudes towards an ideal of fairness in the administration of justice.' Note, 61 Harv. L. Rev. 657 (1948), quoted in the case of *Brooks* v. *Gladden,* 358 P. 2d at p. 1059 (1961).

"In the recent case of *Slochower* v. *Board of Higher Education of New York City,* 1956, 350 U.S. 551, 76 S. Ct. 637, 638, . . . In setting aside the dismissal, Mr. Justice Clark, who delivered the opinion of the Court, pointed out that dismissal under the section was automatic, with no right to charges, notice, hearing or opportunity to explain, and thus lacking in due process." *Board of Public Ed.* v. *Beilan,* 125 A. 2d 327 (1956), at p. 332.

The questioned statute makes it mandatory for the affected State employee, County employee and all others defined to either sign the Oath or be denied effectively employment or in the contingency they are already employed, remuneration. Fair play demands that a man be given an opportunity to explain as well as to defend his position. The hard mailed fist of this legislation affords no such opportunity. The association with a "contaminated" organization may be for any number of reasonable reasons each of which would be in the public interest, viz. a university professor studying the organizational character of a so-called 'Communist Subordinate organization.'

In *Lerner* v. *Casey,* 357 U.S. 468, 2 L. Ed.2d 1423, at page 1435 L. Ed. Justice Douglas said:

> Our legal system is premised on the theory that every person is innocent until he is proved guilty. In this country we have, however, been moving away from that concept. We have been generating the belief that *anyone who remains silent when interrogated about his unpopular beliefs or affiliations is guilty. *(357 U.S. 414). I would allow no inference of wrongdoing to flow from the invocation of any constitutional right. I would not let that principle bow to popular passions. For all we know we are dealing here with citizens who are wholly innocent of any wrongful action. That must

indeed be our premise. When we make the contrary assumption, we part radically with our tradition . . .

(At page 1437 L. Ed.) When we make the belief of the citizen the basis of government action, we move toward the concept of *total security*. Yet *total security* is possible only in a totalitarian regime[2]—the kind of system we profess to combat.

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[2] In an analogous situation, Judge Pope stated the problem for the Court of Appeals in *Parker* v. *Lester* (C.A. 9 Cal.) 227 F. 2d 708, 271.

> "It cannot be said that in view of the large problem of protecting the national security against sabotage and other acts of subversion we can sacrifice and disregard the individual interest of these merchant seamen because they are comparatively few in number. It is not a simple case of sacrificing the interest of a few to the welfare of the many. In weighing the considerations of which we are mindful here, we must recognize that if these regulations may be sustained, similar regulations may be made effective in respect to other groups as to whom Congress may next choose to express its legislative fears. No doubt merchant seamen are in a sensitive position in that the opportunities for serious sabotage are numerous. If it can be said that a merchant seaman notwithstanding his being on board might sink the ship loaded with munitions for Korea, it is plain that many persons other than seamen would be just as susceptible to security doubts. The enginemen and trainmen hauling the cargo to the docks, railroad track and bridge inspectors, switchmen and dispatchers, have a multitude of opportunities for destruction . . .
>
> It may be possible that we have reached an age when our system of constitutional freedom and individual rights cannot hold its own against those who, under totalitarian discipline are prepared to infiltrate not only our public services, but our civilan employments as well. In the event of war we may have to anticipate Black Tom explosions on every waterfront, poison in our water systems, and sand in all important industrial machines. But the time has not come when we have to abandon a system of liberty for one modeled on that of the Communists. Such a system was not that ordained by the framers of our Constitution. It is the latter we are sworn to uphold."

Justice Brennan in the same decision, at page 1438 L. Ed. says:

> Moreover, the States' actions touch upon important political rights which have ever warranted the special attention of the courts. It may be stated as a generality that government is never at liberty to be arbitrary in its relations with its citizens, and close judicial scrutiny is essential when state action infringes on the right of a man to be accepted in his community, to express his ideas in an atmosphere of calm decency, and to be free of the dark stain of suspicion and distrust of his loyalty on account of his political beliefs and associations.

In the case of *Alpert* v. *Board of Governors of City Hospital,* 145 N. Y. S. 2d 534 (1955), the Court held that a qualified physician could not be arbitrarily denied the use of the facilities of a City Hospital and at page 538 said:

> . . . (2) public or governmental action is limited by the constitutional requirement of due process of law.
>
> [2] In one sense, of course, there is no constitutional right to practice medicine in a public hospital, *Hayman* v. *City of Galveston,* 273 U.S. 414, 47 S. Ct. 363, 71 L. Ed. 714, any more than there is an absolute right to sell alcoholic beverages or to drive an automobile. Valuable privileges, however, are also entitled to the protection of law. *Hecht* v. *Monaghan,* 307 N.Y. 461, 121 N.E. 2d 421; *Wignall* v. *Fletcher,* 303 N.Y. 435, 103 N.E. 2d 728; *Elite Dairy Products* v. *Ten Eyok,* 271 N.Y. 488, 3 N.E. 2d 606 . . . There was in this case a lack of procedural due process in arriving at the determination.

Though the doctor in the case had no contractual or statutory right to practice at the City Hospital, that Court recognized the fundamental duty upon the State to act with fairness.

In *Rudder* v. *U.S.*, 226 F. 2d 51 (1955), the Court dealt with the attempted termination of tenancy in a municipal housing unit upon the refusal of the tenant to sign a certificate that they were not members of certain listed organizations to be unconstitutional. The Court said at page 53:

> The government as landlord is still the government. It must not act arbitrarily, for, unlike private landlords, it is subject to the requirements of due process of law. Arbitrary action is not due process.

The Arizona Statute is arbitrary in that it does not afford a person an opportunity before placing himself in jeopardy of criminal prosecution or in jeopardy of severe economic loss to defend his association or to be informed as to the particular organization to which he may not belong.

Kenneth Culp Davis, Professor of Law, University of Minnesota Law School, in his article, "The Requirement of a Trial Type Hearing", 70 Harvard Law Review No. 2 commencing at page 193 in 1956, discusses the type and character of cases in which there was a requirement of a trial type hearing. In discussing the usual type of argument that public employment is a privilege, he points out that

> The plain fact is that the Courts often give legal protection to what they persist in calling 'privileges'. In doing so they commonly rely upon one or more of three ideas or on a fourth method which involves the lack of

an idea. The three ideas are: (1) that constitutional principles of substantive and procedural fairness apply even when only a privilege is at stake and even when the privilege itself is not directly entitled to legal protection; and (2) that when a privilege is combined with another interest the combination may be a right and accordingly entitled to legal protection. The remaining method is (3) to cast logic to the winds in discussing right and privilege or to provide legal protection to a privilege without mentioning the problem of privilege.

(I) The essence of the first idea is that the government is still the government even when it is dispensing bounties, gratuities, or privileges, that we want the government to be fair no matter what its activities may be, and that often the best way to assure governmental fairness is by relying upon judicial enforcement of the usual concepts of fairness. Therefore, the basic constitutional limitations having to do with fairness often apply even though the privileges as such are not entitled to legal protection.

In tort law, the accident victim has no right to be helped by the (p. 226) passer-by who volunteers to help. Like the passer-by, the government may refuse altogether to help applicants for gratuities, but it cannot provide the help improperly; it cannot grant or withhold on the basis of racial or religious discrimination.

At page 227 he continues and says:

Confronted with its own previous statement that persons seeking employment in the New York public

schools have "no right to work for the State in the school system on their own terms," [121]

[121] *Adler* v. *Board of Educ.*, 342 U.S. 485, 492 (1952).

the Court responded:

> To draw from this language the facile generalization that there is no constitutionally protected right to public employment is to obscure the issue. . . . We need not pause to consider whether an abstract right to public employment exists. It is sufficient to say that constitutional protection does extend to the public servant whose exclusion pursuant to a statute is patently arbitrary or discriminatory.[122]

[122] 344 U.S. at 191-92.

At pp. 229, 230:

> A New York Court has stated a proposition which any other court is free to use as a tool for justice: "Valuable privileges . . . are . . . entitled to the protection of law." [127]

[127] *Alpert* v. *Board of Governors of City Hospital*, 286 App. Div. 542, 547, 145 N.Y.S. 2d 534, 538 (4th Dep't 1955).

At page 229:

> Even if working for the government is regarded as no more than a privilege, a discharge for disloyalty or for doubt about loyalty may involve such legal rights as those in reputation and in (p. 230) eligibility for other employment. The Supreme Court has specifically recognized this. In holding that the Constitution was violated by excluding certain persons from employment at a state college, the Court declared:

> 'There can be no dispute about the consequences visited upon a person excluded from public employment on disloyalty grounds. In the view of the community, the stain is a deep one; indeed, it has become a badge of infamy. Especially is this so in time of cold war and hot emotions when "each man begins to eye his neighbor as a possible enemy." '[128]

[128] *Wieman* v. *Updergraff*, 344 U.S. 183, 190-91 (1952), quoting an address by Judge Learned Hand.

At pp. 240-241:

> The Supreme Court in *Cole* v. *Young*[173] has already shown that it is willing to make the private interest paramount when the employee's position is not a sensitive one. Even though procedure was (at p. 241) not directly involved, the Court pointed out that the statute called for summary action and declared:
>
> > 'Indeed, in view of the stigma attached to persons dismissed on loyalty grounds, the need for procedural safeguards seems even greater than in other cases, and we will not lightly assume that Congress intended to take away those safeguards in the absence of some overriding necessity, such as exists in the case of employees handling defense secrets.[174]

[173] 351 U.S. 536 (1956).
[174] Id. at 546-47.

In addition, in *Nostrand* v. *Little*, 386 U.S. 436, 7 L. Ed. 2d 436, this Court's dismissal of the appeal from that case in the State of Washington, 361 P. 2d 561, is interesting in that as reported in the briefs of counsel at page 954, 7 L. Ed., U.S. Supreme Court Reports, and in particular

the abstract of the brief filed by the Attorney General from the State of Washington, set forth at page 950,

> "The procedure prescribed in the rules and regulations for the hearing before discharge of a professor is substantially the same as for an accused person in a court of law, except for a jury trial."

It would appear, then, that in the dismissal, this court was indicating that unless there was some form of hearing to allow a party an opportunity to explain his position, a State could not either under procedural Due Process guaranteed by the Fourteenth Amendment to the U.S. Constitution, or Freedom of Speech and Assembly as guaranteed by the First Amendment to the U.S. Constitution, arbitrarily deny employment or the substance of employment, deny salary.

This case is not foreclosed by the court's decision in *Beilan* v. *Board of Education,* 357 U.S. 399, for the issue there was that the teacher was dismissed for incompetency, arising from her refusal to answer questions directed to her for the purpose of obtaining information that might bear on her competency as a teacher. Nothing per se in that decision would suggest that a person might be fired as a teacher because of membership in the Communist Party. In any event, the teacher was afforded a hearing in the *Beilan* case, and procedural due process was therefore satisfied.

In re Anastaplo, 366 U.S. 82, and *Konigsberg* v. *Calif.,* 353 U.S. 252, do not apply to this case because they deal with membership in the Bar, which they held was a privilege; and, as noted in *Wieman* v. *Updergraff,* 344 U.S. 183, state employment is not within this privileged classification.

Adler v. *Board of Education*, 342 U.S. 485, does not foreclose the issues in this case, for again the facts in that case indicate a legislative investigation, a hearing for the purpose of determining information upon which the particular level of State government could act.

The Arizona statute merely labels and classifies oath-takers and non-oath-takers. No information is garnered by the State. No public benefit—except for red-baiting of the individuals—is obtained.

In general, this interpretation of the denial of procedural due process was adopted in the case of *Heckler* v. *Shepard*, 243 F. Supp. 841, decided June 19, 1965. It would appear that the Idaho State statute demanded that the State employee affirm his loyalty and swear non-participation in any organization that advocated the forcible overthrow of the Government. Upon the employee's refusal, he was to be summarily discharged.

The same result is obtained in Arizona, in that the employee is either denied employment forthwith or is substantially discharged by reason of termination of his salary. In contradiction of the opinion of the State Supreme Court of Arizona, the Federal Court held (and advisedly so):

> "... (The) unexplained refusal to take an oath of the kind prescribed by the Idaho statute may be as injurious to the state employee as a criminal conviction:"

All in all, to take by covert oath the ephemeral right to work elsewhere, the right of an American to know where he stands and to know what his responsibility is to his government, and to take away his "day in court", is no less a theft than the taking of his birthright.

As Mr. Justice Frankfurter said in *McNabb* v. *U. S.*, 318 U.S. 332 at page 347:

> "The history of liberty has largely been the history of observance of procedural safeguards."

THE LEGISLATION IS UNCONSTITUTIONAL IN THAT THERE IS NO LEGAL NEED TO INFRINGE UPON THE CONSTITUTIONAL GUARANTEES OF FREEDOM OF SPEECH AND ASSEMBLY

Without question, the compulsion to sign the loyalty oath provided for in the questioned statute and the premised limitation on the activities of governmental employees in the State of Arizona is a restriction on the constitutional rights to Freedom of Speech and Assembly of every such employee.

Assuming that the court could adopt the Relativist Doctrine of balancing the guarantees of the Bill of Rights against the social need of protecting the State of Arizona from the activities of subversive employees, it is the position of the petitioner herein that there has been no legal demonstration of any such need.

Like Freedom of Speech and a Free Press, the Right of Peaceable Assembly was considered by the Framers of our Constitution to lie at the foundation of a government based upon the consent of an informed citizenry, a government dedicated to the establishment of justice and the preservation of liberty. It is now beyond dispute that freedom of association for the purpose of advancing ideas and airing grievances is protected by the Due Process of the Fourteenth Amendment from invasion by the State.

See

DeJonge v. *State of Oregon*, 299 U.S. 353, 364, 57 S. Ct. 255, 259, 81 L. Ed. 278;

NAACP v. *State of Alabama,* 357 U.S. 449, 460, 78 S. Ct. 1163, 1170, 2 L. Ed. 2d 1488; and *Bates* v. *City of Little Rock,* 80 S. Ct. 412 (1960).

In *Bates* v. *City of Little Rock, supra,* the court quoted with approval *NAACP* v. *State of Alabama, supra*:

> "This court has recognized the vital relationship between the freedom to associate and privacy in one's association. . . . Inviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs."

Again in *Bates* v. *City of Little Rock, supra,* Justice Black, concurring, said:

> ". . . First Amendment rights are beyond abridgement either by legislation that directly restrains their exercise or by suppression or impairment through harassment, humiliation, or exposure by government. One of those rights, freedom of assembly, includes of course freedom of association; and it is entitled to no less protection than any other First Amendment right . . . "

In the case of *Killingsworth* v. *West Way Motors, Inc.,* 347 P. 2d 1098 (Ariz. 1959) the court said:

> ". . . The Legislature does have such powers even over a legitimate business even if it is of such a nature that it is susceptible to abuse so long as such legislation is reasonable and not arbitrary and has a reasonable relation to the purpose of its enactment. The measure of its police powers is always commensurate with public necessity." Citing *Edwards* v. *State Board of Barber Examiners,* 72 Ariz. 108, 231 P. 2d 450.

See also "Natural Rights and the Founding Fathers—the Virginians" by C. J. Antieau, Prof. Law, Georgetown U. v. 17 Washington & Lee Law Review p. 43 et seq.

In the case of *Village of Moyie Springs, Idaho* v. *Aurora Mfg. Co.*, 353 P. 2d 767 (1960), the court said at pp. 774-5:

> "(3) Neither can the legislature bind the courts by its declaration that the act shall not be construed to be in violation of certain provisions of the constitution. The limitations of the constitution are binding upon the legislature, and cannot be nullified or avoided by the simple device of declaring them inapplicable."

See also *Wynehamer against The People,* New York Reports, Cases in the Court of Appeals, V 13 (1888) p. 378; *Near* v. *Minn. ex rel. Olson,* 283 U.S. 697, 75 L. Ed. 1357 (1930); and *Gilbert* v. *Minnesota,* 254 U.S. 325, 41 S. Ct. 125.

Judge Leon Yankwich, U.S. District Ct. Judge, Southern California, in a long article in Hastings Law Journal, X, commencing at p. 250 in an article entitled "Social Attitudes as Reflected by Early California Law" points out that

> "More and more restraints on personal liberty are sought in the name of national security . . . reveals a pattern which is old in the history of freedom of expression in the English speaking world . . . The argument used is that inherent in every government is the right to defend its existence. But granted this to be so, it must do it by democratic means and not resort to the methods of totalitarianism."

He further points out that every time there is some scare, the old device of the use of the loyalty oath is brought out by the inflamed members of the legislature.

See also

Taylor, GRAND INQUEST (1955);
Mason, SECURITY THROUGH FREEDOM (1955);
Wiggins, FREEDOM OR SECRECY (1956);
Brown, LOYALTY AND SECURITY (1951).

A study of the foregoing authorities would indicate that the so-called legislative need is merely the hysteria of the public removed to the halls of the timid legislators.

The legislation in Arizona was adopted without public hearings, without affording the broad mass of the people the opportunity to discuss the danger of the slander promulgated in the City of Phoenix, Arizona by one of Dr. Schwartz's notorious "Anti-Communist Crusade" school sessions, which were meeting and picketing the capital city of the state at the same time that the State Legislature was meeting and adopting the legislation in question.

No opportunity was afforded the public employees of this state to challenge the completely unsupported public disparagement of them as being treasonable. No hearings; no findings; not even findings or reports by the House Committee on Un-American Activities of the Congress have ever made any findings within the State of Arizona.

One may also take Justice Holmes' dictum of "clear and present" or Judge Learned Hand's weakened and watered-down version. Taking either, where can the courts find any justification in concluding that there is a danger to the State of Arizona? The Federal Courts had the long (and somewhat infamous) hearings of the Federal Congressional Committees on Un-American Activities dating back to the rather colorful Martin Dies (circa 1938). There are no such rec-

ords of hearings in the State of Arizona. An examination of the voluminous material of the Federal Congressional Committee indicates that they have never held any hearings in the State of Arizona.

If the Arizona State Legislature has never held hearings and made report of subversion within our State, and the Federal Congress has held no hearings in this State, then, aside from the puffing of the hysterical legislators, do we find the necessary requisite fact situation demanding the infringement of our rights by this infamous statute?

See for cases and reviews dealing with the "clear and present danger" doctrine:

In re Albertson's Claim, 168 N.E. 2d 242 (1960);

Danskin v. *San Diego, UN. Sch. Dist.,* 171 P. 2d 885;

First Unitarian Church v. *Los Angeles,* 357 U.S. 545, 2 L. Ed. 2d 1484, 78 S. Ct. 1350 (1958);

DeJonge v. *Oregon,* 299 U.S. 353, 81 L. Ed. 278 (1937);

United States v. *Schneiderman,* 102 F. Supp. 87 (Calif. 1951);

Gilbert v. *Minnesota,* 254 U.S. 325, 41 S. Ct. 125;

American Civil Liberties Union of Southern California v. *Board of Education of City of Los Angeles,* 359 P. 2d 359 (1961);

29 Iowa L. Rev. 448 (1944) "Constitutional Liberties and Statutory Construction," by Frank E. Horack, Jr. (B.A. 1926, J.D. 1929, State Univ. of Iowa; LL.M. 1930, S.J.D. 1931, Harvard.) (Editor: Casebook on Legislation, 1940; Prof. of Law, Indiana U.), 5 UCLA L.R. 316 (1958);

"Case notes: Constitutional Law, Smith Act: Meaning of Advocate . . . " by Robert W. Vidor, Calif. Law Rev. V 47:930 Cons. Law Note.

Even assuming that the Communist Party now has a special status in American Law (see *Steinmetz* v. *California State Board of Education,* 271 P. 2d 614 (1954)), this questioned statute of the State of Arizona does not limit itself to that named party but puts under interdict all who belong to any organization which may advocate the forcible overthrow of this government, having knowledge thereof.

Because the petitioner in this case is a school teacher, the problem of this type of legislation regarding teaching becomes even more pertinent.

In considering the legislative need for this type of legislation, not only the effect on the violation of the Bill of Rights must be considered but also the effect of such legislation. Its effect must be thought of in terms of (1) the injury it does and (2) its effectiveness to answer the evil which it purports to cure.

The effect on government employees and particularly on the professional groups by all reports has been devastating. It has put them in a position of jeopardy, of fear, that has caused them to restrict their areas of inquiry with a resultant loss of knowledge.

(Historians have noted that an incalculable amount of damage was done to the exploration and accumulation of knowledge by reason of the direct and indirect fears of scholars that they would be put to THE INQUISITION for heresy; viz. Galileo and his struggle with The Inquisition; how many lesser men just gave up!)

The best study of this has been done by Lazarsfeld and Thielens, Jr., in a book called "The Academic Mind", published by the The Free Press Publishers, Glencoe, Illinois 1958, being a report of the University of Columbia Bureau of Applied Social Research. The entire book is quotable and should be read. It says in general that the effects of the present loyalty craze have been devastating to the academic world.

The Committee on Social Issues of the Group for the Advancement of Psychiatry (a society of more than 150 psychiatrists), published a Seminar October 1954 indicating the general conclusion that the effect of these loyalty oaths was deleterious in the extreme to the functioning of the academic world.

According to the bulletin of the American Association of University Professors, Summer Issue, June 1960, that august body disapproved the disclaimer affidavit requirement of the National Defense Education Act of 1958 by adopting a resolution to that effect at its 46th annual meeting. Universities such as Brandeis University, Massachusetts; Bryn Mawr College, Pennsylvania; Harvard University, Massachusetts; Yale University, Connecticut; Mount Holyoke, Massachusetts and numerous others have refused to participate or have withdrawn in whole or in part from NDEA program because of its demand that students and professors doing the work must file a disclaimer affidavit. The article also lists over a hundred institutions of higher education whose presidents or boards have publicly stated their disapproval.

The growing alarm as to the effect of this disclaimer oath on higher education in the United States is such that finally the Federal Congress in the last year abolished the dis-

claimer affidavit requirement of the National Defense Education Act of 1958.

In dealing with the effectiveness of the statute, all reports indicate its *ineffectiveness*. See "Report on the Los Angeles City and County Loyalty Programs" by Harold T. Horowitz, Asst. Dir. Grad. Program, School of Law USC, 5 Stanford Law Rev. 233; Clark Byse (Prof. of Law, Univ. of Pa. Law School), "A Report on the Pennsylvania Loyalty Act", V 101, Univ. of Pa. Law Rev. p. 480 et seq.; Alex Nelson member Illinois Bar, Chairman of Illinois State Bar Association's Committee on Civil Rights, Article "People, Government and Security", V 51 Northwestern Univ. Law Rev., p. 79; and John Lord O'Brien: "New Encroachments on Individual Freedom", 66 Harvard Law Rev. No. 1.

See also "The Great Historical Examination of Oaths" by Helen Silving in two issues of the Yale Law Journal. Most particularly, I refer you to the second part of the article entitled "The Oath: II" in V 68 of the Yale Law Journal commencing with page 1527. In closing her long dissertation, she concludes:

> "The democratic state must limit its claim to man's truth to instances of clear superior interest, and it must yield that claim in cases where disclosure of truth cannot be expected from the individual. Such cases include all those involving the accused or the suspect, as well as all persons closely connected with them. With or without oath, no man should be bound by law to make disclosures which would cause him or persons close to him substantial harm. Man should be held by law to average law abidance, not to the utmost self-sacrifice."

For cases dealing with the effect and need of this legislation, see the following cases and reviews:

Shelton v. *Tucker,* 81 Sup. Rep. 247 (1961);
Rockwell v. *Morris,* p. 25, New York Supplement, 2nd Series, V 211 #1, 1961;
Board of Public Ed. Sch. Dist. of Phila. v. *Intille,* 136 A. 2d 420;
The University of Chicago Law Review, V. 18, No. 4, 1951, Comments: pp. 757-816.

In summary: There is no need; the statute is ineffective; and it is gravely dangerous to our society.

In any consideration of the need for this type of legislation, without granting the petitioners a hearing, it would seem that the Legislature, by allowing parties to continue employment if they are wealthy "subversives", or so dedicated as to maintain this subversion without salary, would admit that there was no substantial danger to the public institutions of this State.

Note further: To the date of this brief, there has not been one prosecution initiated under these statutes in the State of Arizona.

In brief, the statute, by its hopeless complication of verbiage, is so vague as to be violative of the Sixth Amendment to the U.S. Constitution. It places the full burden upon the honest citizen employee to define in advance, at his peril, such words as "knowingly", "willfully", "does commit or aid", "advocates the overthrow", or "knowingly or willfully becomes or remains".

What can the word "remain" mean? The statute relates that if you remain a member after signing the oath, you

are guilty of a felony; but there is no legal procedure to have your name stricken from a private organization's roster.

What is a "subordinate organization of the Communist Party"? If one reads the newspapers, according to those who are now coming to be considered responsible people, such organizations as the American Civil Liberties Union, a goodly number of the members of the United States Supreme Court, and at least fifty percent of the State Department, are in effect members of a subordinate organization of the Communist Party!

There is no legislative definition of these terms, approved by judicial decision, which would allow the ordinary, reasonable employee of the State of Arizona or one of its cities —whether he is a garbage collector or a Doctor of Philosophy—to so reasonably guide his conduct, after taking the demanded oath, as to avoid the snares of unjust prosecution.

The fiendishness of this legislation is that it deprives the most honest man of the will to sign. The most conscionable man would be the first to notice its snares and refuse the oath. The net effect, of course, is to deny the State of Arizona the most qualified people for its service, and to that extent therefore to deny to the country as a whole the best administration of its government.

The statute is a Bill of Attainder in violation of Article I, Section 10 of the U.S. Constitution, as interpreted by the Supreme Court in *Cummings* v. *Mo.*, 18 L. Ed. 366 (1866). In this case, where test oaths for attorneys, priests, candidates for public office and others who may have aided the South during the Civil War, was the issue, they were held by the United States Supreme Court to be Bills of At-

tainder. In *Cummings, supra,* Mr. Justice Field defined a Bill of Attainder as:

> "... a legislative act which inflicts punishment without a judicial trial ... (The legislature is) creating the deprivation without any of the ordinary forms and guards provided for the security of the citizen in the administration of justice by the established tribunals."

It will be noted that it is the elimination of the adjudicatory process which offends the prohibition against the Bill of Attainder, not the fact that the attaint was *ex post facto.*

Mr. Justice Field continued:

> "We do not agree with the counsel of Missouri that 'to punish one is to deprive him of life, liberty or property, and that to take from him anything less than these is no punishment at all.' The learned counsel does not use these terms—life, liberty and property—as comprehending every right known to the law.... The deprivation of any rights, civil or political, previously enjoyed, may be punishment." 4 Wall. 320.

In *Ex parte Garland, supra,* Mr. Justice Miller, though dissenting, defined a Bill of Attainder (p. 388):

> "I think it will be found that the following comprise those essential elements of bills of attainder in addition to the one already mentioned (corruption of the blood), which distinguish them from other legislation and which made them so obnoxious to the statesmen who organized our government: I. They were convictions and sentences pronounced by the Legislative Department of government instead of the Judicial. II. The sentence

pronounced and the punishment inflicted were determined by no previous law or fixed rule. III. The investigation into the guilt of the accused, if any such were made, was not necessary or generally conducted in his presence or that of his counsel and no recognized rule of evidence governed the inquiry."

This definition was clear and unequivocal. It was followed in *U. S.* v. *Lovett,* 328 U.S. 303, 66 S. Ct. 1073, 90 L. Ed. 1252 (1946). Congress denied pay to named government employees. Mr. Justice Black wrote the opinion of the court, striking down the legislation as a bill of attainder, "a legislative act which inflicts punishment without judicial trial" (p. 315). This Court held that *Garland* and *Cummings* stand for the proposition "that legislative acts, no matter what their form, that apply either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial are bills of attainder prohibited by the Constitution."

The instant case meets every test laid down by these cases. The Court in the cases cited—concerned with the fact that the adjudication was by the Legislature—made no issue as to whether past, present or prospective conduct was inhibited. The acts were held to be bills of attainder.

Justice Douglas, dissenting in *Flemming* v. *Nestor,* 80 S. Ct. 1367 (1960) at page 1382 et seq. characterizes the evil to be ended by the Constitutional prohibition of Bills of Attainder, as being the indiscriminate censure of citizens by legislative fiat. He quotes the address of Irving Brant on the proposition that James Madison won the fight in Constitutional Committee to extend the prohibition from

merely criminal penalties to that of public censure. To force a public employee to make a theoretical choice between signing The Oath or starving, with all the public censure aroused by "red-baiting" is to allow the Legislature the unconstitutional privilege of enacting a Bill of Attainder.

In *Heckler* v. *Shepard, supra,* the Federal Court has accepted as a matter of common knowledge, of which the Court may take judicial notice, that where public dismissal automatically follows failure to take and subscribe a test oath, the inevitable assumption of the community is that the employee failed the test.

A history of Bills of Attainder would indicate that they were not limited to providing a punishment for past acts alone, but included punishment in the event of future acts. (See 13 W.I.L.L. 3, c. 3 pub.) Bills of Attainder historically provided the penalty that unless by a certain date the individual or class undertook to change their conduct (see 19 Geo. 2, c. 26 pub.), the penalty of attainder would lie. The historical requirement of punishment was originally, in early decisions of our courts, restricted from the European concept of public censure to one demanding criminal incarceration or fine, to again a broader concept of punishment as expressed in the adoption by the U.S. Supreme Court that expatriation of a citizen is punishment. (See *Perez* v. *Brownell,* 356 U.S. 44, 1958.) This later doctrine of punishment is more nearly within the concepts laid down by the court in *Cummings* v. *Missouri, supra.*

Thus, in the instant case, though the activity sought to be proscribed is future in its application, and the party has an opportunity to change his conduct, and the punishment is not penal servitude or fine, and the loss is of employment or the substance of employment: salary—that statute meets

all the historical definitions of a Bill of Attainder, as is therefore prohibited. (See "The Bounds of Legislative Specification: A Suggested Approach to the Bill of Attainder Clause," Yale Law Journal, Vol. 72, 1962, pp. 330-367.)

The doctrine of *mens rea*, the Constitutional requirement of specificity in the terms of criminal statutes, and the prohibition against Bills of Attainder are fundamentally all aspects of the Founding Fathers' desire to maintain a separation of powers between the departments of government. The Legislature, with the very restrictive power of impeachment, may not become a Judiciary and impose either direct or indirect penalties upon an individual without affording him the full panoply of a judicial proceeding. The Judiciary may not act as a Legislature by applying legislation which by its terms is so general and vague as to allow them to in effect write legislation. The prospective defendant (citizen) must have such law so clearly expressed as to have acted in spite of his knowledge of its illegality.

In construing legislation that is subject to Constitutional attack, the Court must be loath to interpret it by adding Constitutional prohibitions, for two reasons:

1) It becomes encroachment on the legislative power of delineating its own legislation; and

2) It subjects the citizen to even more dangers of ultimate vagueness. The doctrine of *stare decisis* has not been known for its rigidity of application and most certainly not in more recent years. With the power of the court to change its Constitutional interpretation, the well-advised and legally-advised citizen is subjected to the possibility that his unknowing conduct may not be his defense to a charge of

membership in a subversive organization by the subsequent rationale of a later appellate court and without the protection of the Constitutional mandate of the prohibition against *ex post facto* law.

Thus, in the instant case, the statute is unconstitutional as being a Bill of Attainder.

Again, the statute is unconstitutional as an attempt by indirection to force a citizen to incriminate himself, in violation of the Fifth Amendment to the U.S. Constitution.

One might ask:

Against whom is one giving testimony, under the terms of the statute in question, when there is not the usual trial or hearing procedure? There is no court; there is no administrative body. But certainly there is the court of public opinion.

The legislation is a denial of Equal Protection of the Laws, provided by the Fourteenth Amendment to the U.S. Constitution, in that there has been no distinction supported by evidence, between the possible deleterious effects of subversion by the general members of the public of the State of Arizona and subversion by the garbage collector of the lowly City of Tucson.

In *People* v. *Felberbaum*, 199 N.Y.S. 2d 326 (1960), holding a statute unconstitutional which provided different standards of justice for the cities of more than one million population and cities with less, that court said:

> "While we realize that the legislature has a right to enact different laws affecting the smaller communities than those which affect the large cities, such right is limited to procedural regulations and not to substantive

> rights guaranteed to all citizens alike. The right to such constitutional guarantees is preserved to all citizens of the state, be they 'right or wrong', 'truthful or lying', 'good citizens or bad.' "

If the statute in question is "good" for the public employee, it should be given "more good" for the head of public utilities, whose activities might in times of emergency do more irreparable damage than any grade school teacher teaching "a subversive form of the A B C's."

This action having been referred back to the State Supreme Court by the United States Supreme Court for reconsideration in light of *Baggett* v. *Bullitt,* 12 L. Ed. 2d 377, it is the position of the Petitioner that the Arizona statute in question is unconstitutionally vague under the ruling of said case.

Referring to the *Baggett* case, *supra,* at page 382, Col. 2, at the last paragraph thereof, in the Lawyer's Edition report of the case, the Court says:

> "The oath required by the 1955 statute suffers from similar infirmities. A teacher must swear that he is not a subversive person: that he is not one who commits an act or who advises, teaches, abets or advocates by any means another person to commit or aid in the commission of any act intended to overthrow or alter, or to assist the overthrow or alteration, of the constitutional form of government by revolution, force or violence."

Abstracting by omitting some of the alternatives, the 1955 Washington Law will read as follows:

> "A teacher must swear that he is not a (knowingly*) subversive person: that he is not (knowingly*) one who . . . advocates . . . another person to commit or aid in the commission of any act intended to overthrow . . . the constitutional form of government by . . . force or violence."

Subsection E of the Arizona law can be abstracted by omitting some of the alternatives, as follows:

> "Any . . . employee . . . having taken the . . . oath . . . and knowingly or wilfully at the time of subscribing the oath . . . or at any time thereafter during the term of office . . . does . . . advocates the overthrow by force or violence of the government of this state . . . shall be guilty of a felony."

In the *Baggett* case the quoted portion of the Washington Law was held unconstitutional. The Court said at page 383 of Lawyer's Edition:

> "The susceptibility of the statutory language to require foreswearing of an undefined variety of 'guiltless knowing behavior' is what the Court condemned in Cramp. This statute, like the one at issue in Cramp, is unconstitutionally vague."

We thus see that the Arizona Statute and the Washington Statute are quite similar and it would appear therefore that the ruling of the United States Supreme Court should be identical.

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* I have added the word *knowingly* on the basis of both the *Baggett* and *Gerende* cases that the words of scienter will be presumed.

Gerende v. *Board of Supervisors,* 341 U.S. 56, 95 L. Ed. 745, 71 S. Ct. 565, has been cited by the state as authority for the constitutionality of the Arizona statute. The *Gerende* case is no longer—if it ever was—authority in support of the constitutionality of the Arizona statute. It is interpreted by the majority opinion in *Baggett* v. *Bullitt, supra,* in footnote to the Court's opinion No. 7, as follows:

> " . . . under Maryland law requires one to swear that he is not a person who is engaged 'in an attempt to overthrow the government by force or violence' and that he is not knowingly a member of an organization engaged in such an attempt." (Note that scienter was read into the law by the Supreme Court in its original decision.)

The Court in the *Baggett* case, *supra,* thus distinguishes the Maryland law from the Washington statute, affirming in effect the *Gerende* case, *supra,* on the basis of the above interpretation. The Arizona statute does not come within the *Gerende* case because our statute says (see Subsection E): " . . . or advocates the overthrow by force or violence."

The word "engage", in its ordinary usage, is a word of action, such as "to engage the enemy." Whereas, the word, "advocate", as used in the Arizona statute, may mean just the words in a philosophical argument. Assuming, then, the *Gerende* case to still be the law, it does not apply to the Arizona statute, and by reference the *Baggett* case would hold the Arizona Statute unconstitutional.

Dennis v. *United States,* 341 U.S. 494, 95 L. Ed. 1137, 71 S. Ct. 857, and *Yates* v. *United States,* 354 U.S. 298, 1 L. Ed. 2d 1356, 77 S. Ct. 1064, have both been cited by the

State as authority that the proscription against advocacy of the violent overthrow of the government is not unconstitutional. If this was the previous understanding of the meaning of the *Dennis* and *Yates* cases, the majority opinion in the *Baggett* case now overrules these previous interpretations. The majority in its opinion, as set forth in its footnote 8, on page 383 of the Lawyer's Edition report of the *Baggett* case, points out that the *Dennis* case is only authority that,

> " . . . teaching and advocacy of action for the accomplishment of (overthrowing or destroying organized government) by language reasonably calculated to incite persons to sudden action . . . as speedily as circumstances would permit."

The *Dennis* decision does not allow the proscribing of advocating the forceful overthrow of the government.

The footnote further goes on to point out that the *Dennis* case does not uphold over a vagueness challenge (of constitutionality) that knowing and willful advocacy of the violent overthrow of the government is not protected by constitutional protection (Freedom of Speech—Freedom of Assembly).

Again, in the same footnote, the majority of opinion points out that *Yates* v. *United States,* 354 U.S. 298, 1 L. Ed. 2d 1356, 77 S. Ct. 1064,

> "The Smith Act reaches only advocacy of action for the overthrow of the government by force and violence."

The Arizona Statute in question proscribes all advocacy on the part of the public employees which advocates the

forceful overthrow of the government, without any limitation. To make the advocacy illegal, it must be "language reasonably calculated to incite persons to sudden action . . . as speedily as circumstances would permit," or advocacy of *action* for the overthrow of the government. Therefore, the *Baggett* opinion is authority that mere advocacy for the overthrow of the government by force and violence is protected by the United States Constitution under Freedom of Speech or Freedom of Association, and the Arizona Statute proscribing just such advocacy is therefore unconstitutional.

The concept of adequate forewarning before conduct could give rise to social punishment is envisioned in the *Talmud,* as set forth in a most interesting article by Helen Silving "The Origins of the Magnae Cartae", Harvard Journal of Legislation, Vol. III, No. 1, December, 1965, page 117, et seq.

> "However, the Talmud showed concern with the question of whether the children of Noah could be bound by a law that was not proclaimed at the time of their conduct. The Bible requires as a condition of punishment that the offender know the law in advance of the commission of the crime and not merely that he have an opportunity to learn it. These are all the elements of the maxim, *'nullum crimen, nulla poena sine lege praevia et scripta,'* statutory advance description, strict interpretation, and prohibition of analogy."

We are again involved in interpreting a statute with severe personal penalties, which acts prospectively, making the more sensitive man the most limited in his conduct. It

is not what reasonable men might or might not do in the way of prosecuting teachers or professors, but the very loose wording of the statute which puts the judgment on the individual as to what the possibilities of interpretation of such a word as *advocate* might mean at a future time and place.

The Court in the *Baggett* case, *supra,* points this out most convincingly:

> "Even if it can be said that a conviction for falsely taking this oath would not be sustained, the possibility of prosecution cannot be gainsaid. The State may not require one to choose between subscribing to any unduly vague and broad oath, thereby incurring the likelihood of prosecution, and conscientiously refusing to take the oath with the consequent loss of employment, and perhaps profession, particularly where 'the free dissemination of ideas may be the loser.' Smith v. California, 361 U.S. 147, 151, 4 L. Ed. 2d 205, 210, 80 S. Ct. 215. 'It is not the penalty itself that is invalid, but the exaction of obedience to a rule or standard that is so vague and indefinite as to be really no rule or standard at all. Champlin Refg. Co. vs. Corporation Comm'n of Oklahoma, 286 U.S. 210, 243, 76 L. Ed. 1062, 1083, 52 S. Ct. 559, 86 ALR 403, cf. Small Co. v. American Refg. Co., 267 U.S. 233, 69 L. Ed. 589, 45 S. Ct. 295."

In considering the import of the *Baggett* case as it applies or may apply in the whole field of government loyalty oaths, it may be that the dissenting opinion of Mr. Justice Clark, joined in with Mr. Justice Harlan, more nearly points out the breadth of the majority's opinions than one might understand by just reading the majority opinion. The dis-

senting opinion states that the majority's decision does in fact overrule en toto the *Gerende* case, *supra* (*Garner* v. *Board of Public Works,* 341 U.S. 716, 95 L. Ed. 1317, and *Adler* v. *Board of Education,* 342 U.S. 485, 96 L. Ed. 517), and therefore knocks out the legal foundation of the state's position in this case of the constitutionality of the Arizona Statute. The dissenting opinion states that there is not sufficient difference between the wording, say in the *Gerende* case, of its loyalty oath and the wording of the loyalty oath in the Washington statute held constitutional by the majority opinion in the *Baggett* case to allow a reasonable distinction. If the dissent be right, then it is clear that what the majority in the *Baggett* case either did or is moving toward doing is to reverse the *Gerende* and other loyalty oath decisions and hold those loyalty oaths previously held constitutional, unconstitutional.

In considering the constitutionality of the Arizona Statute, the broad implications of the *Baggett* decision must be applied to all portions of the statute. Thus this Court should review whether the other terms of Section E are so vague as to be unconstitutional. Is the expression "remains a member of the Communist Party of the United States, etc." not too vague to be constitutional? What procedure will determine and show whether a person has disaffiliated? What criteria is established by the Statute to evidence such a termination of membership? In *NAACP* v. *Button,* 371 U.S. 432-433, 9 L. Ed. 2d 418, it states:

> "In appraising a statute's inhibitory effect upon such rights, this Court has not hesitated to take into account possible applications of the statute in other factual contexts besides that at bar. Thornhill v. Alabama, 310 U.S. 88, 97-98 (84 L. Ed. 1093, 1099, 1100,

60 S. Ct. 736); Winters v. New York (333 U.S. 507), 518-520 (92 L. Ed. 840, 851, 852, 68 S. Ct. 665). Cf. Staub v. City of Baxley, 355 U.S. 313 (2 L. Ed. 2d 302, 78 S. Ct. 277) . . . . The objectionable quality of vagueness and overbreadth does not depend upon absence of fair notice to a criminally accused or upon unchannelled delegation of legislative powers, but upon the danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping and improper application. Cf. Marcus v. Search Warrant, 367 U.S. 717, 733 (6 L. Ed. 2d 1127, 1137, 81 S. Ct. 1708). These freedoms are delicate and vulnerable, as well as supremely precious in our society. The threat of sanctions may deter their exercise almost as potently as the actual application of sanctions."

Again, what criteria are established in the statute for determining what is a subordinate organization or successor organization to the Communist Party?

In *Aptheker* v. *Secretary of State*, 12 L. Ed. 2d 992, p. 1001, the Court says:

"In determining the constitutionality of Sec. 6, it is also important to consider that Congress has within its power 'less drastic' means of achieving the congressional objective of safeguarding our national security. Shelton v. Tucker, 364 U.S., at 488, 5 L. Ed. 2d at 237. The Federal Employee Loyalty Program, which was before this Court in Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 95 L. Ed. 817, 71 S. Ct. 624, provides an example. Under Executive Order No. 9835, membership in a Communist organization is not

considered conclusive but only as one factor to be weighed in determining the loyalty of an applicant or employee."

If it has not been felt necessary in the Federal Loyalty Program to automatically disbar from public employment membership in a Communist organization, this Court may appreciate the lessened need to invade the right of Freedom of Association and of Speech of the public employees of the State of Arizona.

Notice again, that as per footnote 9 of the majority's decision in the *Aptheker* case, *supra* (page 1000 of the Lawyer's Edition), the type of membership held to be permissively proscribed by the Federal Congress "was interpreted to include only 'active' members . . . " who have "knowledge of the organization's illegal advocacy." The Arizona Statute in question makes no such distinction as to the membership of the Communist Party proscribed, nor does it make any limitation on the type of advocacy proscribed.

In *Malloy* v. *Hogan*, 12 L. Ed. 2d 653, the United States Supreme Court has made certain the application of the Fifth Amendment guarantees against self-incrimination to the state through and by the Fourteenth Amendment to the United States Constitution. It thus becomes the Federal standard to the right against self-incrimination rather than the state interpretation of such right. It would therefore seem incumbent on this Court to review the Arizona State Loyalty Oath on the issue of self-incrimination. A reliance on any of the previous federal decisions in which State loyalty oaths were upheld, as against the right of self-incrimination, would now appear to be in jeopardy by reason of the collateral effect of *Malloy* v. *Hogan, supra.* Those

previous State Loyalty Oath cases, viz., *Garner* v. *Board of Public Works,* were decided at a time when only the state application of the doctrine against self-incrimination was considered. If our extant law is accusatory rather than inquisitional, which *Malloy* v. *Hogan* reconfirms, then to place the burden upon each employee of the State of Arizona to decide whether or not to sign the oath in question is in fact asking him to incriminate himself in the public mind as a Communist, and therefore is inquisitional rather than accusatory. For if he fails to sign the oath, he will be branded as a suspect person. He must take the financial burden that goes with the unofficial blacklist. The nature and horrible effects of the informal blacklist have been demonstrated publicly time and time again in the entertainment industry. How may a man decide what organization he may or may not belong to when the informal United States Attorney General's list varies from month to month and year to year, listing its purported Communist infiltrated organizations? (See Law in Transition Quarterly, Vol. 1, Fall 1964, #4, Aruel A. Morris, *Baggett* v. *Bullitt*: Scienter "Guiltless Knowing Behavior."

As Barbara Ward in her book, FAITH AND FREEDOM, Image Books, 1958, questions:

In an age of materialism, how can one expect the government to trust the untrammeled spirit of Man? The Legislature of the State of Arizona has voted its distrust of all the employees of government agencies of the State of Arizona. The Founding Fathers expressed their trust in the words of the Constitution. The then citizens of the colonies expressed their trust in themselves and their distrust in such legislators by their forcing the adoption of the Bill of Rights.

When one compares the overall strengths of the State of Arizona and of the United States of America in 1961 with the relatively undeveloped strength of the State of Arizona in 1931, and (even the more outrageous to the imagination) the poor and bedraggled signers of the Declaration of Independence with a runt of a country in mortal combat with the largest European power, how can we be so ashamed of ourselves and so fearful as to have so much less faith than they in our fellow citizen?

Freedom is like a delicate flower. Its blossom is subject to perish at the slightest exposure to an uncongenial environment, but its root is deep and strong and ever producing of that blossom which images the nature of each man and of all Mankind.

In conscience alone, this Court should declare the legislation unconstitutional.

Respectfully submitted,

this 8th day of January, 1966

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APPENDIX

Constitution of the United States

ARTICLE I

Section 10.

No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Control of the Congress.

No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.

AMENDMENT I.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

AMENDMENT V.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment

of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT VI.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

AMENDMENT XIV.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male

inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

A.R.S. § 38-231 and § 38-233

As amended Laws 1961, Ch. 108, § 5 and § 6.

§ 38-231. Officers and employees required to take loyalty oath; form; penalty

A. In order to insure the statewide application of this section on a uniform basis, each board, commission, agency, and independent office of the state, and of any of its political subdivisions, and of any county, city, town, municipal corporation, school district, and public educational institution, shall immediately upon the effective date of this act completely reproduce § 38-231 as set forth herein, to the end that the form of written oath or affirmation required herein shall contain all of the provisions of said section for use by all officers and employees of all boards, commissions, agencies and independent offices.

B. For the purposes of this section, the term officer or employee means any person elected, appointed, or employed, either on a part-time or full-time basis, by the state, or any of its political subdivisions or any county, city, town, municipal corporation, school district, public educational institution, or any board, commission or agency of any of the foregoing.

C. Any officer or employee elected, appointed, or employed prior to the effective date of this act shall not later than ninety days after the effective date of this act take and subscribe the form of oath or affirmation set forth in this section.

D. Any officer or employee within the meaning of this section who fails to take and subscribe the oath or affirmation provided by this section within the time limits prescribed by this section shall not be entitled to any compensation unless and until such officer or employee does so

take and subscribe to the form of oath or affirmation set forth in this section.

E. Any officer or employee as defined in this section having taken the form of oath or affirmation prescribed by this section, and knowingly or wilfully at the time of subscribing the oath or affirmation, or at any time thereafter during his term of office or employment does commit or aid in the commission of any act to overthrow by force or violence the government of this state or of any of its political subdivisions, or advocates the overthrow by force or violence of the government of this state or of any of its political subdivisions, or during such term of office or employment knowingly and wilfully becomes or remains a member of the communist party of the United States or its successors or any of its subordinate organizations or any other organization having for one of its purposes the overthrow by force or violence of the government of the state of Arizona or any of its political subdivisions, and said officer or employee as defined in this section prior to becoming or remaining a member of such organization or organizations had knowledge of said unlawful purpose of said organization or organizations, shall be guilty of a felony and upon conviction thereof shall be subject to all the penalties for perjury; in addition, upon conviction under this section, the officer or employee shall be deemed discharged from said office or employment and shall not be entitled to any additional compensation or any other emoluments or benefits which may have been incident or appurtenant to said office or employment.

F. Any of the persons referred to in Article XVIII, Section 10 of the Arizona Constitution as amended, related to the employment of aliens, shall be exempted from any compliance with the provisions of this section.

G. In addition to any other form of oath or affirmation specifically provided by law for an officer or employee,

before any officer or employee enters upon the duties of his office or employment, he shall take and subscribe the following oath or affirmation:

State of Arizona, County of .....

I, ... do solemnly swear (or affirm) that I will support the Constitution of the United States and the Constitution and laws of the State of Arizona; that I will bear true faith and allegiance to the same, and defend them against all enemies, foreign and domestic, and that I will faithfully and impartially discharge the duties of the office of ..... (name of office) ..... according to the best of my ability, so help me God (or so I do affirm).

(type or print name)

.....

(signature of officer or employee)

§ 38-233. Filing oaths of record

A. The official oaths of state elective officers shall be filed of record in the office of the secretary of state. The official oaths of all other state officers and employees shall be filed of record in the office of the employing state board, commission or agency.

B. The official oaths of notaries public and of elective county and elective precinct officers shall be filed or recorded in the office of the county recorder, except the oath of the recorder, which shall be filed with the clerk of the board of supervisors. The official oaths of all other county and precinct officers and employees shall be filed of record in the office of the employing county or precinct board, commission or agency.

C. The official oaths of all city, town or municipal corporation officers or employees shall be filed of record in the respective office of the employing board, commission or agency of the cities, towns and municipal corporations.

D. The official oaths of all officers and employees of all school districts shall be filed of record in the office of the superintendent of public instructions.

E. The official oaths of all officers and employees of each public educational institution except school districts shall be filed of record in the respective offices of said public educational institutions.

F. The official oath or affirmation required to be filed of record shall be maintained as a permanent official record.

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In The
Supreme Court of the United States

OCTOBER TERM, 1965

No. 656

BARBARA ELFBRANDT, PETITIONER

vs.

IMOGENE R. RUSSELL, ET AL.

RESPONDENTS ANSWERING BRIEF

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In The
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OCTOBER TERM, 1965

No. 656

BARBARA ELFBRANDT, PETITIONER

vs.

IMOGENE R. RUSSELL, ET AL.

RESPONDENTS ANSWERING BRIEF

QUESTIONS PRESENTED FOR REVIEW

Respondents respectfully submit that certain of the questions presented for review are not properly before the Court for the reason that they are incorrect in fact and in law.

Specifically on page 3 petitioner refers to "false swearing" and "necessity of an oath". The statute in question clearly allows an affirmation as an alternative to an oath and consequently the penalty is for perjury, not for false swearing.

In addition the next "question" attempts to raise an issue of "administrative regulation" of conduct. There are no provisions in the law relative to administrative regulations. The

only administrative duty is a ministerial act of filing an oath or affirmation and certifying that a salary can be paid.

In addition on page 5 of her brief the petitioner alleges that there is a difference in the duty or obligation imposed on the public employees and a duty or obligation imposed on all of the citizens. Since the sedition statute, A.R.S., 13-707 (not challenged herein) applicable to all persons, and the perjury statute applicable to public employees are exactly the same, the burden is exactly the same. A.R.S., 13-1641 states that an act which is punishable in different ways by different sections of law may be punished under either but in no event under more than one section of the law.

SCANDALOUS MATTER

The respondents respectfully request in accordance with Rule 40(5) of the rules of this Court that the Court strike from the brief the sentence on page 11 beginning with the words "to submit to" and ending with "of the government". The statement is one of fact not warranted by the record and is an unsubstantiated and unwarranted insult to the entire bench and bar, in fact to all the million and half citizens of the State of Arizona.

STATEMENTS OF FACT NOT PART OF THE RECORD

There are numerous allegations and statements of fact in the brief which are not supported in the record or supportable in fact. Respondents will deal with them individually as they occur in the argument if possible, but feel constrained at the outset to point out one allegation in particular which is initially stated at page 10 and reiterated directly or by implication elsewhere.

Petitioner states:

> "It was clear that in good conscience a great number of people could not sign the oath".

There is not one jot or tittle in the record to support this. Respondents do not wish to copy petitioner's error in alleging mat-

ters outside the record, but we would be remiss in our duty if we did not state that there has been no indication whatsoever of any person other than the petitioner (and her husband) who found any difficulty with the oath or affirmation.

SUMMARY OF ARGUMENT

1. Administrative Due Process is Not a Valid Issue

It is the position of the respondents that there is no administrative law issue for the simple reason that administrative agencies perform only the simplest ministerial act of filing the oath or affirmation and informing the disbursing officer. No agency is entitled to investigate, interrogate or discharge an employee for any violation of the law. The subscription of the oath or affirmation is simply a requirement of employment exactly the same as the oath required of federal employees since 1884, 5 U.S.C. 16; Territory and State Offices in Arizona since 1901, A.R.S. 38-231 and School Teachers in Arizona since 1935, A.R.S. 15-231. No civil service, merit system or tenure right which may exist or may have existed is or was affected by the law.

2. There Exists a Reasonable Need for a Reasonable Law Such as This.

The Arizona Legislature had a right to rely on matters of common knowledge in ascertaining potential danger to the state and local government functions. The bill itself as well as the Senate judiciary report indicates an intelligent approach with full regard for the rights of others. Much of the adverse reaction to some oaths is that they are disclaimers. The law in question is a simple, affirmative declaration. As for crimes specifically created, the prohibition of acts to overthrow the government by force and violence is not an issue. The prohibition against advocacy of the overthrow of government by force and violence has the prior approval of this Court. *Dennis v. United States,* 341 U.S. 494; *Uphaus v. Wyman,* 360 U.S. 72. The prohibition against becoming or remaining a member of the Communist party or any organization that has for one of its purposes the overthrow of the

government by force or violence is only a slight restriction of association in a limited area perfectly justified by circumstances and by the decision of this Court in *Gerende v. Bd. of Supervisors,* 341 U.S. 56.

3. There Is No Vice Of Vagueness in the Bill.

Baggett v. Bullitt, 377 U.S. 360 does not apply for the reason that the language found in the Washington law is simply not in the Arizona law. Only advocacy of the overthrow of the government by force or violence is prohibited, and such a prohibition is permissible under *Dennis* v. *United States,* 341 U.S. 494; *Gerende v. Bd. of Supervisors,* 341 U.S. 56, cited with approval in *Baggett v. Bullitt, supra.*

4. The Legislation is Not a Bill of Attainder.

The law imposes no punishment for past acts, names no one, designates no reasonably identifiable class. It makes no determination of guilt, it merely adds an additional qualification for employment which is not dependent upon past activities. The argument has no shadow or substance. *United States v. Brown,* 381 U.S. 437.

5. The Fifth Amendment is Not Involved.

Petitioner seems to state that a person must take the oath and thereby commit a crime (if actually guilty) or face condemnation before "the court of public opinion" (Petitioner's Br., 35). This is utterly untrue. A person in employment at the time of enactbent could merely resign without giving a reason and no one else is required to seek public employment. There was and is no publicity unless a person seeks it himself.

6. Equal Protection of the Laws is Not Denied.

In the first instance the general sedition law applicable to all is the same as the perjury section applicable to state or public employees. And in the second place a state has a right to require higher standards of public employees than of the general citizen. *Adler v. Bd. of Education,* 342 U.S. 485.

ARGUMENT
I
THE ADMINISTRATIVE DUE PROCESS IS NOT AN ISSUE

The precise question before the Court is most accurately set forth in the dissent in *Nostrand v. Little,* 362 U.S. 474 at 478:

> "A hearing under the present statute would obviously be important to a determination of the existence of 'scienter' for presecution of one who took the oath for perjury. But such a hearing is not germane to the question whether under this statute a teacher has a right to refuse to take the oath that is tendered. The command of the statute is clear: Refusal to take the oath 'on any ground' is cause for discharge. That command poses the critical issue for us. A remand for determination of whether there will be a hearing therefor seems to me a remand for an irrelevancy in the setting of this case."

The question then resolves itself into two factual situations. Some state employees have job security, among them school teachers, highway department employees, welfare, and employment security employees, either by state law or federal requirement. Many others, including assistant attorneys general, university professors, and tax commission employees have no job security. Such persons can be hired and fired at will; no reason need be shown or stated. Archaic as it may seem there is an occasional change in position based on nothing more substantial than an election. Rumor has it that this also may be true in the federal government.

The law in issue changed nothing. If there was no prior right to a hearing, the law deprived no one the right which they never had. If there was a right to a hearing, the law did not purport to change it and one would be granted.[1] The essential problem thus

[1]The same is true of other public employment. While the City of Phoenix for example has a well-organized personnel program, with internal procedures and remedies, the same is hardly true of Gila Bend or Tombstone.

remains the same. If the administrative process neither grants a new right nor denies an established right, and if it in addition is powerless to effect the status of those seeking to invoke it, of what value is a hearing The answer is that given by Mr. Justice Douglas in *Nostrand v. Little, supra*—no value at all.

All the explanations in the world, combined with all the defenses of the mind of man could conjure, would not authorize the Livestock Sanitary Board to compensate a cattle inspector who did not sign the oath or affirmation.

Similarly, no governmental agency can discharge an employee for "disloyalty". No agency has any authority to "investigate", "interrogate" or "charge" any one of their employees. The only sanction for a violation of the law is that of the criminal law, with all the substantive and procedural safeguards of the full judicial process. In addition, it must be pointed out that a public employee is no worse a situation than any other person. The sedition law of A.R.S. 13-707 is applicable to all persons within the state and is exactly the same as the perjury law applicable to public employees. A public employee could in theory be charged with either perjury or sedition, but is fully protected from double danger by the provisions of A.R.S. 13-1641.

> "An act or omission which is made punishable in different ways by different sections of the law may be punished under either but in no event under more than one. An acquittal or conviction and sentence under either one bars a prosecution for the same act or omission under any other."

If we assume, however, that the constitution requires that a person or any employee has a right to explain or defend a refusal to subscribe an oath or affirmation, the petitioner has explained and defended her refusal in the very forum designed for such action. An administrative agency is ill-equipped by nature and powerless by law to do anything with such a complaint. A court, however, is designed for such a purpose and armed with the pre-

cise weapons the petitioner needs; the authority to declare a law unconstitutional entirely or inapplicable in particular.[2]

We should not let offhand statements concerning "administrative due process" becloud common sense. Administrative *due* process is only important where administrative *process* itself has any value or could result in any prejudice, substantive or procedural, to the parties involved.

Slochower v. Bd. of Education, 350 U.S. 551 has no application herein. A teacher otherwise protected by tenure statutes was discharged summarily for invoking a privilege against self-incrimination before an investigative sub-committee of the United States Senate. It was admitted that the invocation of the privilege was proper. The New York Court of Appeals held that the New York City charter provision calling for summary discharge of anyone claiming the privilege was a valid condition of employment. This Court understandably disagreed, relying principally on *Weimann v. Updegraff,* 344 U.S. 183, and distinguishing *Adler v. Bd. of Education,* 342 U.S. 485 and *Garner v. Los Angeles Bd. of Supervisors,* 341 U.S. 716. The holding stands for the reasonable proposition that a public employer may not demand that its employees be forced to waive a constitutional protection to which all persons are entitled as a condition of employment without an opportunity to explain why any such employee does not wish to waive such a constitutional right.

Here we have no question of waiver of any right or privilege whatsoever. The condition of employment is a subscription of a simple affirmative oath or affirmation. The fact that a state may legitimately inquire into the conduct of its employees and obtain from them a statement concerning their basic loyalty has been answered in *Adler v. Bd. of Education, supra,* and in numerous other cases. Even in those cases where individual state laws have fallen for vagueness, as in *Baggett v. Bullitt, supra,* and *Cramp*

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[2]Since an administrative determination would end up in court without serious doubt, the practical effect of an administrative protest would only mean more delay.

v. Bd. of Public Instruction, 368 U.S. 278 or for lack of requirement of scienter, *Weimann v. Updegraff, supra;* the basic right of a state to proceed in the area of internal security and to require such a statement has remained unchallenged.[3]

The Oath Or Affirmation Itself Is Proper

The Arizona oath or affirmation is virtually the same as that required of all federal employees under 5 U.S.C. 16.

> "I, A B, do solemnly swear (or affirm) that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties of the office on which I am about to enter. So help me God."

This was originally enacted in 1884 and has been extended to various specific phases of employment now so that virtually every part of the executive branch of government is covered by the oath. As recently as 1964 a similar oath was prescribed for enrollees in the Job Corps Program provisions of the Economic Opportunities Act. See 42 U.S.C. 2714(C):

> "I do solemnly swear (or affirm) that I will bear true faith and allegiance to the United States of America and will support and defend the Constitution and laws of the United States against all its enemies foreign and domestic."

Every state in the United States has an oath form for civil defense workers (who may be unpaid volunteers, not regular em-

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[3]*Cramp v. Bd. of Public Instruction,* 137 So.2d 828 (Fla., 1962). On motions for entry of judgment pursuant to the mandate of the Supreme Court 368 U.S. 278, the Supreme Court of Florida held, *inter alia,* that the United States Supreme Court held unconstitutional only that portion of the loyalty oath which related to past and future lending of aid, support, advice, counsel or influence of the Communist party, and that the remainder of the statute requiring the loyalty oath, with the unconstitutional portion thereof eliminated, remained in full force and effect. This decision apparently has never been challenged.

ployees). The following language is prescribed by 50 U.S.C. App. 2255(d):

> "Each person other than a Federal employee who is appointed to serve in a State or local organization for civil defense shall before entry upon his duties take an oath in writing before a person authorized to administer oath, which oath shall be substantially as follows; '..... do solemnly swear (or affirm) that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; and that I will bear true faith and allegiance to same; that I take this obligation freely, without any mental reservation or purpose of evasion; that I will well and faithfully discharge the duties upon which I am about to enter. " 'And I do further swear (or affirm) that I do not advocate, nor am I a member or an affiliate of any organization, group, or combination of persons that advocate the overthrow of the Government of the United States by force or violence; and that during such time as I am a member of the (name of civil defense organization) I will not advocate nor become a member or an affiliate of any organization, group, or combination of persons that advocate the overthrow of the Government of the United States by force or violence.' " "Any person who shall be found guilty of having falsely taken such oath shall be punished as provided in Section 1621 of Title 18."

Some forty-one states require non-elective personnel to subscribe to an oath or affirmation to support and or defend the Constition of the United States and/or their own state.

Internal Security or Subversion, a study prepared for the subcommittee to investigate the administration of the Internal Security Act and other Internal Security Laws of the Committee on the Judiciary of the United States Senate by the American law division legislative reference service, Library of Congress (committee print, Page 445, Table 18)

A similar Arizona oath has been in effect insofar as state offices are concerned since 1901. It read:

> "State of Arizona, County of ....., I ....., do solemnly swear that I will support the Constitution of the United States and the constitution and laws of the State of Arizona; and that I will bear true faith and allegiance to same, and defend them against all enemies whatever, and that I will faithfully and impartially discharge the duties of the office of (name of office) according to the best of my ability, so help me God." A.R.S. 38-231

This law was made applicable to all state employees by the provisions of A.R.S., 38-233 and to school teachers in 1935 by the provisions of A.R.S., 15-231.

To state that such a commonplace, long-standing oath or affirmation, common to millions of federal employees as well as to most state employees, constitutes a waiver of a constitutional privilege such as to require a hearing, is to fly on the face of law and reality.

II

THERE EXISTS A REASONABLE NEED FOR A REASONABLE LAW SUCH AS THIS

Petitioner claims that the law is invalid because there were no public hearings in Arizona. Respondents submit that the classic statement of Mr. Justice Fields regarding the judiciary is equally applicable to the members of the State Legislature.

> ". . . we cannot shut our eyes to matters of public notoriety and general cognizance. When we take our seats on the bench we are not struck with blindness, and forbidden to know as judges what we see as men" Ho Ah Kow v. Numan, 12 Fed. Cas. 252 (No. 6546) (C.C. Cal. 1879) (Field, J. as Circuit Judge)

Arizona is still one of the United States, we trust. A large share

of upholding law and order, providing for the needs of the civilian population, and maintaining a relative stability in a critical situation, devolves upon state and local agencies. This was recognized and approved by the Court in *Uphaus v. Wyman,* 360 U.S. 72.[4] Specific hearings or findings in this area are not necessary.

The only question which would approach the serious is the extent of governmental instrusion into or a restriction upon recognized rights.

There can be no doubt, nor is it claimed, that the section of the law forbidding the act to overthrow or an act aiding in the commission of the overthrow of the government by force or violence is improper.

There can be as little doubt that "advocacy" of the overthrow of the government by force or violence is equally a permissible prohibition by a state. Petitioner attempts to create an issue which does not exist. It is states that in *Yates v. United States,* 354 U.S. 298 the Court held:

> "That the Smith Act reaches only advocacy *of action* for the overthrow of the government by force and violence." [Emphasis supplied.]

Petitioner then states that because the Arizona Statute does not contain the phrase "of action" it means even "the words in a philosophical argument". (Petitioner's Br., p. 38) However, petitioner misses the heart of the matter. The Smith Act, 18 U.S.C. 2385 does not state "of action" any more than does Arizona law. Advocacy was held by this Court in *Yates, supra,* and others to mean advocacy of action. This is a judicial and normal interpretation of the word; and was known before the act in question was passed. In addition the cases of this Court were consulted. *Journal of the Senate, Appendix B, p. 3.*

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[4]We take no serious issue with the dissent by Mr. Justice Brennan, joined in by the Chief Justice. Our concern is solely with the right and duty of local authority to deal with civil disturbances recognized in the majority opinion and in the dissent of Mr. Justice Brennan and the Chief Justice.

Of even more binding importance was the specific recognition of the cases decided by this Court in the decision of the Supreme Court of Arizona. *Elfbrandt v. Russell,* 94 Ariz. 1, 381 P.2d 554, 559. An interpretation by the Arizona Supreme Court is part of Arizona law. If this court in later cases further refines, clarifies or expands the definition of "advocacy" its action will be as binding on Arizona under our law as it would be binding on the Federal Government under the Smith Act.

The other area of possible restriction is the prohibition of membership in organizations where the member knows that one of the purposes of the organization is to overthrow the government by force or violence. Respondents submit that the decision of this Court in *Scales v. United States,* 367 U.S. 203 (another of the cases specifically mentioned in the Arizona decision) is clear authority for and a binding interpretation of the meaning of "membership".[5] The Supreme Court of Arizona frankly admitted that there was some limitation on the activities of individuals:

> "We recognize the prohibited conduct in denying membership in the enumerated organizations diminishes the individual's freedom of association and hence the unfettered communication of ideas, but whatever test be applied, the constitutional restraints are satisfied. The conduct sacrificed to governmental interests minimally and incidentally conflicts with the First Amendment. The gravity and evil sought to be reached, discounted by its improbability, justifies the invasion." 94 Ariz. 1, 10, 381 P.2d 554, 560.

But even if one distrusts the gravity-discount theory of approaching the First Amendment, so ably and clearly set forth by the Honorable Learned Hand the result should be the same.

It has been suggested that the proper approach is that of Alexander Meiklejohn. In a recent article in 79 Harv.L.Rev. 1, pp.

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[5]Fortunately we are not faced with (and since *Albertson v. Subversive Activity Control Bd.,* No. 3 October Term 1965 cannot be faced with) the question of implied repeal or immunity which form the basis of the dissent of Mr. Justice Brennan and the Chief Justice.

1-20, Mr. Justice Brennan outlined Professor Meiklejohn's positions and included this statement of them.

> "He found no fault with laws and ordinances that required the speaker to conform to the necessities of the community with respect to time, place, circumstances and the matter of procedure, as long as they were not mere cover for attempts to suppress speech he classified as having governing importance." *Supra* at 13.

On the subject of governing importance Professor Meiklejohn is quoted as saying:

> "Public discussions of public issues, together with the spreading of information and opinion bearing on those issues, must have a freedom unabridged by our agents [the government]."[6]

But what is a "public discussion of a public issue". We know that shouting "fire" in a crowded theater is not. The respondents believe that the type of "communication" described at length in *Scales, supra* is not. In that case there was a thorough and detailed record of the training given to prospective communist members. Everything was dedicated to violence or sabotage. The basis was rigid discipline and obedience. There was about as much discussion (not to mention public discussion) as there is between a company commander in Viet Nam ordering his squad to silence a mortar position.

In short the communications are one who advocates the overthrow of government by force or violence made to one who is knowingly or actively a member of such an organization so dedicated is akin to obscenity and libel;[7] not of governing import-

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[6]The quotation is from The First Amendment is an Absolute, 1961 S.Ct. Rev. 245, 257 (Kurland ed.)

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[7]Two areas in which Professor Meikeljohn agreed that the governing of social importance was not sufficient to bar punishmnet. See 79 Harv. L. Rev. 1-20, *supra.*

ance and under proper circumstances a valid subject of state action. So *Scales, supra* held; so we urge this Court to hold.

III

THERE IS NO VICE OF VAGUENESS IN THE BILL

Petitioner states that by comparing the Washington law, Rev. Code Wash. Anno. 9.81.020 with the Arizona law, A.R.S. 13-707 (or 38-231 E), we will see "that the Arizona statute and the Washington statute are quite similar." (Petitioner's Brief, p. 7) Petitioner reaches this conclusion by quoting a portion of each statute "by omitting some of the alternatives".

It was precisely the portions "omitted" by petitioner from the Washington law which were found by this Court to be vague in *Baggett v. Bullitt*, 377 U.S. 360. Those same portions form no part of an Arizona law. The statutes are simply not the same. And where the criticized portion of one law is not to be found in the other law the criticism must fail, not the law. Let us turn to the decision itself. The language of Mr. Justice White is clear:

> "Persons required to swear they understand this oath might reasonably conclude that any person who *aids* the Communist Party, or *teaches* or *advises* known members of the Party is a subversive person because such *teaching* or *advcie* may now or at some future date aid the activities of the Party." 377 U.. 360, 367, 368. [Emphasis supplied.]

The first distinction is that under Washington law a person signing the oath states that he has read the law and that he is familiar with the contents thereof. (See Note 4, *Baggett v. Bullitt, supra,* at 377 U.S. 365.) Arizona law contains no such provision and the perjury section can only be violated by an act prohibited under it, the same act applicable to all persons under the sedition law. A.R.S. 13-707.

The second distinction is that the words and phrases singled out as vague or "aid" "advise", "teach" or "advice" and "teach-

ing". None of these words appear in the Arizona law.[8]

The distinction is even clearer in the comparison of the Washington law with the Smith Act. Rev. Code Wash. Anno. 9.81.020 (2) reads:

> "*Advocate, abet, advise* or *teach* by any *means* any person to commit, or assist in the commission of any act under such circumstances as to constitute a clear and present danger to the security of the United States or the State of Washington or of any political subdivision of either of them."

The Smith Act, 18 U.S.C. 2385 states:

> "Whoever knowingly or willingly advocates, abets, advises or teaches the duty, necessity, desirability, or propriety of overthrowing or destroying the government of the United States or the government of any state . . . by force or violence".

The Washington law would require a person to know the "circumstances" which might in the mind of the recipient of the "advice" or "teaching" be a "clear and present danger". Hence Mr. Justice White's understandable concern. The Smith Act, however, as interpreted by *Dennis v. United States,* 341 U.S. 494 transforms such possibly vague words as "abets, advises or teaches" into "teaching and advocacy of acts". 341 U.S. 511, 512. The Arizona law is even clearer by avoiding all possible ambiguity and retaining only "advocates the overthrow by force or violence". There is no need to worry about "aid, advises or teaches". No concern over a potential but perhaps unknown "clear or present danger". Arizona goes to the heart of the matter; something that this Court has done for other legislative draftsmen in the past, but which respondents feel is not even necessary here.

In addition, the very questions which Mr. Justice White posed

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[8] "Aid" does appear in the phrase "aid in the commission of an act to overthrow by force or violence" but is clearly limited therein to an actual accessory, i.e., to a person with a specific intent in fact to accomplish the forbidden. *Elbrandt v. Russell,* 97 Ariz. 416, 379 P.2d 948.

in *Bagget v. Bullitt, supra,* were answered in the negative in *Elfbrandt v. Russell,* 97 Ariz. 146, 147, 377 P.2d 948. The Supreme Court of Arizona, charged with the interpretation of Arizona law as this Court is charged with the interpretation of federal law, has set the limits and prescribed the bounds. Petitioner may not unloose them now.

Petitioner finds some difficulty with the words "knowingly" and "wilfully". Since these words are part and parcel of any and every criminal law; are all crimes to be beyond statutory definition? We fail to follow petitioner's reasoning.

The question of "becoming" or "remaining" a member is also raised. Only a specific organization involved can set the terms of "membership" and since we are bound to read into our law the definition of membership contained in *Scales v. United States,* 367 U.S. 203, the question of membership becomes a question of fact, not of interpretation. No similar objection was sustained in *Scales, supra,* in which the statute involved also used the word "membership". 18 U.S.C. 2385.

IV

THE LEGISLATION IS NOT A BILL OF ATTAINDER

The most recent pronouncement and a thorough summary of the law in this area is contained in *United States v. Brown,* 381 U.S. 437. The principal distinction between that case and this lies in the fact that under the law involved therein, (29 U.S.C. 504) a person who was or *who had been* for five years prior to the enactment of the Act and was also a union officer was guilty of a crime. Under Arizona law no past conduct is in issue, only conduct after the effective date of the law (90 days after enactment). As the Chief Justice pointed out, an official who had been a Communist within five years (but who now might not be) "was given the choice of declining a leadership position in his union or in incurring criminal liability" 381 U.S. 452.

The decision specifically went on to distinguish *American Communications Assn. v. Douds*, 339 U.S. 382, which upheld Section 9(8) of the Taft Hartley Act. (29 U.S.C. 159) (h) (now repealed) and which also had a non-communist provision; in the following language:

> "The Court in Douds focused upon the fact that members of the Communist Party could escape from a class of persons specified by Congress simply by resigning from the Party:
>
> > 'Here the intention is to forestall future dangerous acts; there is no one who may not, by a voluntary alteration of the loyalties which impel him to action, become eligible to sign the affidavit. We cannot conclude that this action is a bill of attainder' ". 381 U.S. 458

The precise distinction therein drawn lies herein. Arizona law makes no mention of past acts and cannot remotely be deemed to be based on a principal of retaliation or proscription.

V

THE FIFTH AMENDMENT IS NOT INVOLVED

Respondents have some difficulty in finding, not to speak of following, petitioner's argument concerning the Fifth Amendment to the Constitution of the United States. It is apparently set forth in two paragraphs on page 35 of the petitioner's brief. It simply does not make sense. No one is or was held to publicly refuse to take an oath or affirmation of allegiance. Employees at the time when the law was passed had ninety days to resign quietly if their sensibilities were offended. As Appendix C shows there was and always will be a constant turnover in state and public employment. Many persons leave simply for better pay. No reason need be given. Similarly no one is impelled to become a public employee or state that a personal dislike of an oath is a reason not to accept a job. There is no "court of public opinion" unless the

person so resigning or so refusing to become employed voluntarily refuses to make a public issue of the matter. The argument is without weight.

VI

THE FOURTEENTH AMENDMENT IS NOT INVOLVED

As we have pointed out elsewhere the activity forbidden state and public employees are likewise forbidden to all persons under the provisions of the sedition law. A.R.S. 13-707. A public employee would lose his job, a private citizen would be barred from public employment. A.R.S. 13-707.01. There is no significant distinction. The head of a public utility *is* under the same onus as a public employee. In addition, cases too numerous to cite have held that public employees, because of the nature of their position, can be held to a higher standard than citizens in general. *Eg. Adler v. Bd. of Education,* 342 U.S. 485.

VII

MATTERS NOT PROPERLY BEFORE THE COURT

As hereinbefore noted the petitioner states that the legislation has had a "devastating effect" on public employees. There is not one iota of evidence to support this. No university professors were asked to testify, no standard and recognized authority was presented to the trial court, no evidence was solicited. (Perhaps because such evidence would have been subjected to cross-examination, impeachment, rebuttal or other standard procedures to arrive at the truth.)

Petitioner is hoist on her own petard in citing the National Defense Education Act of 1958, 29 U.S.C. § 581. True that negative disclaimer oath was eliminated in 1962 by P.L. 87-835, but the affirmative oath of allegiance was left in. This oath (excepting only inapplicable provisions relative to the discharge of the duties

of office), is virtually the same as the Arizona oath. If there has been any outcry to the oath that is still part of the National Defense Education Act, none is cited. The Congress in 1962 did exactly what the Arizona legislature anticipated in 1961. The report of the Senate Judiciary Committee is wryly accurate.

> "It is a sign of hysteria and an indication of that very distrust of the United States, which the communists seek to foment, when each State seeks to devise some special oath of allegiance which is supposed to divide the communist from the loyal citizen. The communist trained in fraud and perjury has no qualms in taking any oath; the loyal citizen, conscience of history's oppressions, may well wonder whether the medieval rack and torture wheel are next for the one who declines to take an involved negative oath as evidence that he is a True Believer. Loyalty to a free society is a matter of fact; nor are there degrees of loyalty to human freedom which are in direct proportion to ingenuity, length and loudness of the loyalty oath."

PEACEABLE ASSEMBLY

Petitioner makes further reference to picketing at the State Capitol during the deliberations of the law in issue. Aside from the constitutional code of the right of people "peacefully to assemble, and to petition the Government for a redress of grievances" are we to invalidate a law because of such activity. If so, one would be forced to mourn the resulting death of both federal and state (including Arizona, A.R.S. 41-1401-1485), Civil Rights acts as their passage was often accompanied by picketing approaching even violence in some instances. When we like a law, a mature legislature has harkened to the needs and desires of the public and answered their reasonable and just requests. When we don't like a law, a timid legislature has bowed to hysteria.

CONCLUSION

Since 1884 every employee of the executive branch of the United States Government has been required to subscribe to a virtually identical oath of allegiance, 5 U.S.C. 16. Since 1901 all Arizona state offices, deputies, clerks, assistants and subordinates have been required to subscribe to a virtually identical oath or affirmation, and all teachers in common school districts of the state have been under that requirement since 1935.

All persons in the state, public employees or not, have been subject to the provisions of the Smith Act since 1940.

The statute in question creates three clearly permissible areas of state action. The Legislature of the State of Arizona has carefully avoided ambiguity and the Supreme Court of Arizona has confirmed this care. The statute provides only for a simple affirmative oath of allegiance to the person who employs you and does not provide for a disclaimer oath beclouded with "ingenuity, length and loudness".

The rights and obligations of educators and scholars are not only protected but encouraged. The Arizona Legislature should not be condemned but should be congratulated for its care and maturity of approach.

The State of Arizona does not come before this Court as a whining supplicant begging for grace or favor. We appear as a sovereign with a proud standard expecting and entitled to respect and honor.

Respectfully submitted,
DARRELL F. SMITH
The Attorney General

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Special Counsel to the
Attorney General

APPENDIX A

Chapter 108, House Bill No. 115

An Act

RELATING TO CRIMES; TO THE PROTECTION OF THE SAFETY OF THE STATE OF ARIZONA AND THE FUNDAMENTAL LIBERTIES OF ITS CITIZENS FROM THE INTERNATIONAL COMMUNIST CONSPIRACY; PROSCRIPTION OF THE COMMUNIST PARTY IN ARIZONA; DEFINING THE CRIME OF SEDITION; REQUIRING LOYALTY OATHS BY PUBLIC OFFICERS AND EMPLOYEES; PRESCRIBING PENALTIES; AMENDING TITLE 16, CHAPTER 2, ARTICLE 1, ARIZONA REVISED STATUTES, BY ADDING SECTIONS 16-205 AND 16-206; AMENDING TITLE 13, CHAPTER 2, ARIZONA REVISED STATUTES, BY ADDING ARTICLE 40.1, SECTIONS 13-707 AND 13-707.01, AND AMENDING SECTIONS 38-231 AND 38-233, ARIZONA REVISED STATUTES.

Be it enacted by the Legislature of the State of Arizona:

Section 1. This act may be cited as the Arizona Communist Control Act of 1961.

Sec. 2. Title 16, chapter 2, article 1, Arizona Revised Statutes, is amended by adding section 16-205, to read:

16-205. FINDINGS OF FACT AND STATEMENT OF PUBLIC POLICY BY THE LEGISLATURE OF THE STATE OF ARIZONA CONCERNING STEPS WHICH MUST BE TAKEN TO PROTECT THE FUNDAMENTAL RIGHTS OF THE CITIZENS OF THIS STATE AND THE SAFETY OF THIS STATE FROM INTERNATIONAL COMMUNISTIC CONSPIRACY

A. Upon evidence and proof which has been presented before this Legislature, other State Legislatures, the Congress of the

United States and in the courts of the United States and in the courts of the several states; and although recognizing that the federal constitution vests the conduct of foreign relations in the federal government and the federal constitution guarantees to the several states a republican form of government and protection against foreign invasion and domestic violence, this state has the duty of self-preservation and the taking of necessary measures to cooperate with the federal government in the preservation of the peace and safety of the State of Arizona and in order to carry out article 2, section 21 of the Arizona Constitution relating to free and equal elections and article 7, section 12 of the Arizona Constitution relating to the enactment of laws to secure the purity of elections; and in order to guard against the abuse of the elective franchise by the Communist Party of the United States which from time to time has qualified as a purported legitimate political party in the State of Arizona; and in order to secure to the citizens of this State their unalienable personal rights and liberty of conscience secured by the provisions of the Constitution of Arizona and in order to protect the peace and safety of the State of Arizona from the overthrow of its constitutional government by force or violence, and of its political subdivisions, the Legislature of the State of Arizona finds and declares that, unlike other political parties which have evolved their policy and programs through public means, by the reconciliation of a wide variety of individual views, and submit those policies and programs to the electorate at large for approval or disapproval, the policies and programs of the Communist Party are prescribed for it by the foreign leaders of the world Communist movement.

B. The Communist Party members have no part in determining its goals, and are not permitted to voice dissent to party objectives. Unlike members of political parties, members of the Communist Party are recruited for indoctrination with respect to its objectives and methods, and are organized, instructed, and disciplined to carry into action slavishly the assignments given them by their hierarchical chieftains. Unlike legitimate political parties,

the Communist Party acknowledges no constitutional or statutory limitations upon its conduct or upon that of its members. The Communist Party is relatively small numerically, and gives scant indication of capacity ever to attain its ends by lawful political means. The peril inherent in its operation arises not from its members, but from its failure to acknowledge any limitation as to the nature of its activities, and its dedication to the proposition that the present constitutional government of the United States, the governments of the several states, and the government of the State of Arizona and its political subdivision ultimately must be brought to ruin by any available means, including resort to force and violence.

C. The establishment of a totalitarian dictatorship in any country results in the suppression of all opposition to the party in power, the subordination of the rights of individuals to the state, the denial of fundamental rights and liberties which are characteristic of a representative form of government, such as freedom of speech, of the press, of assembly, and of religious worship, and said totalitarian dictatorship ruthlessly suppresses academic freedom and inquiry into any human knowledge except the official doctrines of the dictatorship. This results in the maintenance of control over the people through fear, terrorism, and brutality.

D. It is the public policy of this state to protect the safety of the constitutional government of the State of Arizona by constitutional means and at the same time protect the rights of the members of our free society to speak, to assemble and to inquire, including the principle of academic freedom which by fostering healthy self-criticism is especially vital in the progress of man's moral values and in man's exploration of the secrets of the atom on this planet and in outer space. To protect the safety of this state and the right of free citizens in a free society to inquire and to understand totalitarianism, it is essential that the schools, colleges and universities teach objectively and critically the governmental and social forms of past and present totalitarian slave states,

including the foreign languages spoken therein.

The rights set forth in this subsection do not include the right to embrace Communism or to attempt to persuade others to embrace Communism.

E. The direction and control of the world Communist movement is vested in and exercised by the Communist dictatorship of a foreign country.

F. The Communist dictatorship of such foreign country, in exercising such direction and control and in furthering the purposes of the world Communist movement, establishes or causes the establishment of, and utilizes, in various countries, action organizations which are not free and independent organizations, but are sections of a world-wide Communist organization and are controlled, directed, and subject to the discipline of the Communist dictatorship of such foreign country.

G. The Communist action organizations so established and utilized in various countries, acting under such control, direction, and discipline, endeavor to carry out the objectives of the world Communist movement by bringing about the overthrow of existing governments by any available means, including force or violence if necessary, and setting up Communist totalitarian dictatorships which will be subservient to the most powerful existing Communist totalitarian dictatorship. Although such organizations usually designate themselves as political parties, they are in fact constituent elements of the world-wide Communist movement and promote the objectives of such movement by conspiratorial and coercive tactics, instead of through the democratic processes of a free elective system or through the freedom-preserving means employed by a legitimate political party which operates as an agency by which the people govern themselves.

H. In the United States and in this state those individuals who knowingly and wilfully participate in the world Communistic movement, when they so participate, in effect repudiate their allegiance to the United States and this state, and in effect transfer

their allegiance to the foreign country in which is vested the direction and control of the world Communist movement.

I. The Communist movement in the several states is an organization numbering thousands of adherents, rigidly and ruthlessly disciplined. Awaiting and seeking to advance at a moment when the several states may be so far extended by foreign engagements, so far divided in counsel, or so far in industrial or financial straits, that overthrow of the Government of the United States and of the several states by force or violence may seem possible of achievement, it seeks converts far and wide by an extensive system of schooling and indoctrination. Such preparations by Communist organizations in other countries, including the recent events in the neighboring country of Cuba, have aided in supplanting existing governments. The Communist organization in the United States and in the several states, pursuing its stated objectives, the recent successes of Communist methods in other countries, and the nature and control of the world Communist movement itself, present a clear and present danger to the security of the government of the United States, the governments of the several states, and the government of the State of Arizona, including its political subdivisions, that make it necessary that the State of Arizona enact appropriate legislation, recognizing the existence of such world-wide Communist conspiracy, and designed to prevent it from accomplishing its purposes in this State and its political subdivisions. Therefore, the Communist Party should not be permitted to avail itself of the privileges, rights and immunities conferred by law upon legitimate political parties.

Sec. 3. Title 16, chapter 2, article 1, Arizona Revised Statutes, is amended by adding section 16-206, to read:

16-206. PROSCRIPTION OF COMMUNIST PARTY OF UNITED STATES, ITS SUCCESSORS, AND SUBSIDIARY ORGANIZATIONS

The Communist Party of the United States, or any successors of such party regardless of the assumed name, the object of which

is to overthrow by force or violence the government of the United States, or the government of the State of Arizona, or its political subdivisions shall not be entitled to be recognized or certified as a political party under the laws of the State of Arizona and shall not be entitled to any of the privileges, rights or immunities attendant upon legal political bodies recognized under the laws of the State of Arizona, or any political subdivision thereof; whatever rights, privileges or immunities shall have heretofore been granted to said Communist Party of the United States as defined in this section, or to any of its subsidiary organizations, by reason of the laws of the State of Arizona, or of any political subdivision thereof, are hereby terminated and shall be void.

Sec. 4. Title 13, chapter 2, Arizona Revised Statutes, is amended by adding article 40.1, sections 13-707 and 13-707.01, to read:

ARTICLE 40.1 SEDITION

13-707. DEFINITION OF SEDITION; PARTIES; PUNISHMENT

A. A person who knowingly or wilfully commits, or aids in the commission of any act to overthrow by force or violence the government of this state, or of any of its political subdivisions, is guilty of sedition against the State of Arizona.

B. A person who knowingly or wilfully advocates the overthrow by force or violence the government of this state, or of any of its political subdivisions, is guilty of sedition against the State of Arizona.

C. A person who knowingly or wilfully becomes or remains a member of the Communist Party of the United States, or itssuccessors, or any of its subordinate organizations, or any other organization having for one of its purposes the overthrow by force or violence of the government of the State of Arizona, or any of its political subdivisions, and said person had knowledge of said unlawful purpose of said Communist Party of the United States

or of said subordinate or other organization, is guilty of sedition against the state.

D. Any person who violates any provisions of this article is guilty of a felony, and upon conviction thereof shall be punished by a fine of not more than twenty thousand dollars, or imprisonment in the state prison for not more than twenty years, or both.

13-707.01. DISQUALIFICATION TO HOLD OFFICE

Any person who is convicted of violating any provision of this article shall automatically be disqualified and barred from holding any office, elective or appointive, or any position of trust, profit or employment with this state, or any political subdivision of this state, or any county, city, town, municipal corporation, school district, public educational institution, or any board, commission or agency of any of the foregoing.

Sec. 5. Sec. 38-231, Arizona Revised Statutes, is amended to read:

38-231. OFFICERS AND EMPLOYEES REQUIRED TO TAKE LOYALTY OATH; FORM; PENALTY

A. In order to insure the statewide application of this section on a uniform basis, each board, commission, agency, and independent office of the state, and of any of its political subdivisions, and of any county, city, town, municipal corporation, school district, and public educational institution, shall immediately upon the effective date of this act completely reproduce section 38-231 as set forth herein, to the end that the form of written oath or affirmation required herein shall contain all of the provisions of said section for use by all officers and employees of all boards, commissions, agencies and independent offices.

B. For the purposes of this section, the term officer or employee means any person elected, appointed, or employed, either on a part-time or full-time basis, by the state, or any of its political subdivisions or any county, city, town, municipal corporation, school district, public educational institution, or any board, com-

mission or agency of any of the foregoing.

C. Any officer or employee elected, appointed, or employed prior to the effective date of this act shall not later than ninety days after the effective date of this act take and subscribe the form of oath or affirmation set forth in this section.

D. Any officer or employee within the meaning of this section who fails to take and subscribe the oath or affirmation provided by this section within the time limits prescribed by this section shall not be entitled to any compensation unless and until such officer or employee does so take and subscribe to the form of oath or affirmation set forth in this section.

E. Any officer or employee as defined in this section having taken the form of oath or affirmation prescribed by this section, and knowingly or wilfully at the time of subscribing the oath or affirmation, or at any time thereafter during his term of office or employment, does commit or aid in the commission of any act to overthrow by force or violence the government of this state or of any of its political subdivisions, or advocates the overthrow by force or iolence of the government of this state or of any of its political subdivisions, or during such term of office or employment knowingly and wilfully becomes or remains a member of the communist party of the United States or its successors or any of its subordinate organizations or any other organization having for one of its purposes the overthrow by force or violence of the government of the state of Arizona or any of its political subdivisions, and said officer or employee as defined in this section prior to becoming or remaining a member of such organization or organizations had knowledge of said unlawful purpose of said organization or organizations, shall be guilty of a felony and upon conviction thereof shall be subject to all the penalties for perjury; in addition, upon conviction under this section, the officer or employee shall be deemed discharged from said office or employment and shall not be entitled to any additional compensation or any other emoluments or benefits which may have been incident or appurtenant to said office or employment.

F. Any of the persons referred to in Article XVIII, Section 10 of the Arizona Constitution as amended, related to the employment of aliens, shall be exempted from any compliance with the provisions of this section.

G. In addition to any other form of oath or affirmation specifically provided by law for an officer or employee, before any officer or employee enters upon the duties of his office or employment, he shall take and subscribe the following oath or affirmation:

State of Arizona, County of .....

I, ... do solemnly swear (or
(type or print name)
affirm) that I will support the Constitution of the United States and the Constitution and laws of the State of Arizona; that I will bear true faith and allegiance to the same, and defend them against all enemies, foreign and domestic, and that I will faithfully and impartially discharge the duties of the office of .... (name of office) ..... according to the best of my ability, so help me God (or so I do affirm).

.....
(signature of officer or employee)

Sec. 6. Sec. 38-233, Arizona Revised Statutes, is amended to read:

38-233. FILING OATHS OF RECORD

A. The official oaths of state elective officers shall be filed of record in the office of the secretary of state. The official oaths of all other state officers and employees shall be filed of record in the office of the employing state board, commission or agency.

B. The official oaths of notaries public and of elective county and elective precinct officers shall be filed of record in the office of the county recorder, except the oath of the recorder, which shall be filed with the clerk of the board of supervisors. The official oaths of all other county and precinct officers and employees

shall be filed of record in the office of the employing county or precinct board, commission or agency.

C. The official oaths of all city, town or municipal corporation officers or employees shall be led of record in the respective office of the employing board, commission or agency of the cities, towns and municipal corporations.

D. The official oaths of all officers and employees of all school districts shall be filed of record in the office of the superintendent of public instruction.

E. The official oaths of all officers and employees of each public educational institution except school districts shall be filed of record in the respective offices of said public educational institutions.

F. The official oath or affirmation required to be filed of record shall be maintained as a permanent official record.

Sec. 7. SAVING CLAUSE

This act does not apply to any offense committed prior to the effective date of this act, and any such offense is punishable as provided by the statute in force at the time the offense was committed.

Sec. 8. SEVERABILITY

If any provision of this act or the application thereof to any person or circumstance is held invalid, the invalidity shall not affect other provisions or applications of the act which can be given effect without the invalid provision or application, and to this end the provisions of this act are severable.

Sec. 9. EMERGENCY

To preserve the public peace, health and safety it is necessary that this act become immediately operative. It is therefore declared to be an emergency measure, to take effect as provided by law.

APPENDIX B

Report of the Judiciary Committee in Support of the Committee Amendment to H.B. 115, *Journal of the Senate,* 1st Reg. Sess., 25th Legislature of the State of Arizona (1961), pp. 423-425:

"A free society must be dedicated to the protection of the individual from governmental oppression. The American dream is that these rights inhere in any man. They are not revocable privileges bestowed by governments, either totalitarian or free. These human rights are unalienable. Among the most precious are the freedom to speak, to assemble, to organize political parties, to vote for governmental representatives, and to petition these elected officers.

"These rights in the schools become the principle of academic freedom which fosters self-criticism and intellectual skepticism—qualities vital to the pursuit of truth. This freedom to learn how to think objectively is especially important in man's exploration of the secrets of the atom on this planet and in outer space.

"These liberties withstood the test of repeated attacks by German and Japanese totalitarianism. Now, these same liberties are under attack by a Russian Imperialism likewise intent on world domination by external force, internal incitement to violence, fraud, espionage and fifth column treachery. The Communist Party in this Country must be recognized as an instrument of a foreign power and as part and parcel of an international scheme to destroy unalienable human rights by substituting a world wide communistic dictatorship subservient to foreigners.

"The totalitarian enemy is skilled in the formenting of confusion and panic with resulting insecurity and distrust. Citizens of a free society then begin to wonder whether that free society whose citizens have unalienable rights to speak critically can compete successfully with the totalitarian society consisting wholly of conforming, silent slave citizens ruled by a ruthless autocracy.

"National security demands effective action against any group

of citizens, communist or otherwise, whose basic loyalty is to a form of foreign totalitarian domination which seeks to destroy the immemorial rights of the citizens of a free society. America must keep devising remedial measures sufficient in scope and strength to deal adequately with the evil of communist statism. However, it would be ironically tragic if, in the process of fighting totalitarianism, we undermined the very principles of human dignity and freedom which the communist seeks to destroy.

"The fight against international communism must be on a national scale because the Constitution has delegated exclusive management of foreign affairs to the Federal Government. The Executive and Legislative Branches of that government must give effective leadership through the Federal Bureau of Investigation and the Central Intelligence Agency, to the several States and their citizens as to how best to preserve and protect the human rights to Life, Liberty and the Pursuit of Happiness proclaimed by the Declaration of Independence and guaranteed by the Federal Constitution.

"It is a sign of hysteria and an indication of that very distrust of the United States, which the communist seeks to foment, when each State seeks to devise some special oath of allegiance which is supposed to divide the communist from the loyal citizen. The communist trained in fraud and perjury has no qualms in taking any oath; the loyal citizen, conscious of history's oppressions, may well wonder whether the medieval rack and torture wheel are next for the one who declines to take an involved negative oath as evidence that he is a True Believer. Loyalty to a free society is a matter of fact; nor are there degrees of loyalty to human freedoms which are in direct proportion to ingenuity, length and loudness of the loyalty oath. In fact, a communist commits perjury in taking the simplest affirmative oath to support the Constitutions of the United States and that of Arizona.

"Accordingly, your committee reports and recommends for passage H.B. 115 as amended by this committee. The proposed amendment outlaws the Communist Party in Arizona, defines

the crime of sedition, requires an affirmative loyalty oath from all state and local officers and employees, and provides, in effect, that any person signing such an oath who is a member of the Communist Party or any organization committed to overthrow by force or violence of our constitutional government shall be punished as if he had committed perjury. No attempt has been made to include special provisions for forfeiture of property or for special searches and seizures. These matters are already covered by existing law or raise serious constitutional questions which might invalidate the entire act.

"Section 5 paragraph F of the bill as amended by the Committee exempts from the loyalty oath those persons referred to in Article XVIII, Section 10 of the Arizona Constitution as amended. This exemption relates wholly to the working of alien prisoners on work gangs and the employment of aliens under the teacher exchange program authorized by the Congress of the United States. The federal statute is to be found in Title 22, USCA, 'Foreign Relations and Intercourse', Section 1446. This Section provides in part as follows: '* * * a person admitted under this section * * * who engages in activities of a political nature detrimental to the interests of the United States, or in activities not consistent with the security of the United States, shall, upon the warrant of the Attorney General, be taken into custody and promptly deported pursuant to sections 1251-1253 of Title 8 * * *'. In any event, it would be improper to request a French or German national who had been cleared to teach temporarily in the United States to take a loyalty oath to the United States. If he did, he might lose his native citizenship just as an American visiting teacher abroad might lose his American citizenship if he took a loyalty oath to a foreign country.

"An attempt has been made to objectively study the several federal and state statutes relating to the Communist Party, sedition, and loyalty oaths as well as the various federal and state court decisions (usually thinly divided opinions), interpreting the constitutional questions involved. Based upon the foregoing, the com-

mittee amendment plainly recognizes the international communist menace, devises remedial measures on a state level to meet it, and yet does not unduly restrict the very liberties of a free citizen in a free society which communist statism would destroy."

APPENDIX C

Feb. 23 '62
(Stamp)
ATTORNEY GENERAL
STATE OF ARIZONA

Hon. Robert W. Pickrell
The Attorney General
State of Arizona
State Capitol Building
Phoenix, Arizona

February 16, 1962

Dear Mr. Pickrell:

As the Director of personnel of the City of Phoenix, I hereby certify to your office the number of employees employed by the City of Phoenix during the past two (2) fiscal years and the number of employees who have left employment during the same periods. It is to be noted that this list does not include part-time workers (mostly help in the City Parks), but does include all City employees including police and fire department personnel. For the fiscal year commencing July 1, 1959 and ending June 30, 1960, the average number of employees employed by the City of Phoenix was 2,764. During the same period 375 employees left the service of the City of Phoenix. For the fiscal year commencing July 1, 1960 and ending June 30, 1961 the average number of employees employed by the City of Phoenix was 3,295. During the same period of time 325 employees left the employ of the City of Phoenix.

Very truly yours,
/s/LEROY J. BRENNEMAN
Personnel Director

(SEAL)
/s/M. B. BARTLETT
ATTEST:
Notary Public 2-21-62
My Commission Expires Sept. 27, 1962
(SEAL)

C2

ARIZONA STATE RETIREMENT SYSTEM
PHOENIX 30, ARIZONA

Feb. 26 '62
(STAMP)
ATTORNEY GENERAL
STATE OF ARIZONA

February 19, 1962

Honorable Robert W. Pickrell
The Attorney General
State of Arizona
State Capitol Building
Phoenix, Arizona

Dear Mr. Pickrell:

This letter summarizes records of the Retirement System for the past two years, reporting how many employees are employed in those public offices covered by the State Retirement System and how many employees leave the System each fiscal year.

These records reflect the number of persons who withdraw money from the Retirement System. If they later became employed with another public body, this would not be reflected in our statistics. This record does not show the people who actually left, but merely those who withdrew their retirement funds. Some persons leave these funds in for varying lengths of time and then withdraw them. These figures show the number who withdrew funds.

These statistics exclude persons who have died during the course of the year and the funds were paid to their beneficiary, and also exclude those who have actually retired and are drawing retirement benefits. The list also does not include members of any municipal fire department or state or county judiciary retirement system.

We enclose copies of the Annual Reports for the Retirement System, one for the fiscal year ending June 30, 1960 and the second for the fiscal year ending June 30, 1961. Note from the report on the page headed "Arizona State Retirement System

Membership" that we list all political subdivisions who had then established State System membership for their personnel. Note also such membership supplements the membership entitlement granted by the Legislature to all state employees, including the Universities and the State College and certificated school personnel. Names preceded by asterisks note that membership was established as of July 1, 1960 as noted in the report for the fiscal year ending on that date, and that an asterisk precedes a subdivision establishing membership July 1, 1961, as noted in the report issued on that date. Such membership data typically does not include the employee with less than 90 days' service and note that the number of retired members are separately stated.

For the fiscal year concluding June 30, 1960, 4,257 former employees had concluded employment with the state, a school system or a covered political subdivision and withdrew their funds from, and cancelled their membership in, the Arizona State Retirement System. For the fiscal year concluding June 30, 1961, 4,311 former employees had concluded employment with the state, a school system or a covered political subdivision and withdrew their funds from, and cancelled their membership in, the Arizona State Retirement System.

Sincerely,
/s/WAYNE R. GIBSON
Wayne R. Gibson
Director

ATTEST:
/s/CAROL L. DUFF
My Commission Expires Aug. 22, 1965
(SEAL)
Subscribed and sworn to before me this 19th day of February, 1962.

ARIZONA STATE RETIREMENT MEMBERSHIP
1959-1960

All State Employees—including the Universities and College 10,736

School Employees—all teachers in Arizona and the non-teaching employees of the following schools:.... 16,039

Cochise County
- Bisbee Schools
- Douglas Schools
- Wilcox Schools

Coconino County
- Flagstaff Schools
- Williams Schools

Gila County
- Globe Schools
- Miami Schools

Graham County
- Eastern Arizona Junior College

Greenlee County
- Clifton Schools

Maricopa County
- Arlington No. 47
- Alhambra No. 68
- Buckeye Union H. S.
- Cartwright No. 83
- Creighton No. 14
- Fowler No. 45
- Glendale No. 40
- Glendale Union H.S.
- Isaac No. 5
- Liberty No. 25
- Litchfield No. 79
- Madison No. 38
- Paradise Valley Schools
- Phoenix No. 1
- Phoenix Union H. S.
- Riverside No. 2
- Roosevelt No. 66
- Scottsdale Schools
- Tempe Union H. S.
- Washington No. 6
- Wickenburg Schools

Navajo County
- Winslow Schools

Pima County
- Amphitheater Schools
- Marana Schools
- Sahuarita Schools
- Sunnyside Schools
- Tucson Schools

Pinal County
- Casa Grande No. 4
- Stanfield Schools
- Toltec No. 22

Yavapai County
- Prescott Schools
- Verde No. 3

Yuma County
- Yuma No. 1
- Yuma Union H.S. 6,763

Political Subdivisions
- County Employees
  - Cochise
  - Coconino
  - Graham
  - Greenlee
  - Maricopa
  - Mohave
  - Pima
  - Pinal
  - Santa Cruz
  - Yavapai
- City and Town Employees
  - Avondale
  - Chandler
  - Casa Grande
  - Douglas
  - Flagstaff
  - Gilbert
  - Glendale
  - Goodyear
  - Kingman
  - Mesa
  - Prescott
  - Tempe
  - Tolleson
  - Williams
  - Yuma

Flagstaff Housing Authority
Maricopa County Water Conservation District
Pima County Sanitary District

Total Active Members 33,538

Inactive — one year 1,948

Total member accounts 35,486

Retired Members 1,097

/s/WAYNE R. GIBSON
Wayne R. Gibson
Director

ATTEST:
/s/CAROL L. DUFF
(SEAL)
My Commission Expires Aug. 22, 1965

ARIZONA STATE RETIREMENT MEMBERSHIP
1960-1961

All State Employees—including the Universities and College 11,526

School Employees—all teachers in Arizona and the non-teaching employees of the following schools 18,014

Cochise County
- Benson Schools
- Bisbee Schools
- Douglas Schools
- Wilcox Schools

Coconino County
- Flagstaff Schools
- Grand Canyon Schools
- Williams Schools

Gila County
- Globe Schools
- Miami Schools

Graham County
- Eastern Arizona Junior College

Greenlee County
- Clifton Schools

Maricopa County
- Arlington No. 47
- Alhambra No. 68
- Avondale No. 44
- Buckeye Union H.S.
- Cartwright No. 83
- Creighton No. 14
- Fowler No. 45
- Glendale No. 40
- Glendale Union H.S.
- Isaac No. 5
- Liberty No. 25
- Litchfield No. 79
- Madison No. 38
- Paradise Valley Schools
- Phoenix No. 1
- Phoenix Union H.S.
- Riverside No. 2
- Roosevelt No. 66
- Scottsdale Schools
- Sierra Vista No. 97
- Tempe Union H.S.
- Washington No. 6
- Wickenburg Schools

Navajo County
- Winslow Schools

Pima County
- Amphitheater Schools
- Marana Schools
- Sunnyside Schools
- Tanque Verde No. 13
- Sahuarita Schools
- Tucson Schools

Pinal County
- Casa Grande No. 4
- Mammoth-San Manuel Schools
- Stanfield Schools
- Toltec No. 22

Yavapai County
Bagdad Schools
Mingus Union H.S.
Prescott Schools
Verde No. 3

Yuma County
Yuma Union H.S. 7,008

Political Subdivisions
County Employees
Cochise
Coconino
Graham
Greenlee
Maricopa
Mohave
Navajo
Pima
Pinal
Santa Cruz
Yavapai
Yuma

City and Town Employees
Avondale
Chandler
Casa Grande
Douglas
Flagstaff
Gilbert
Glendale
Goodyear
Kingman
Mesa
Prescott
Safford
Scottsdale
Tempe
Tolleson
Williams
Yuma

Flagstaff Housing Authority
Flood Control District of Maricopa County
Maricopa County Waetr Conservation District
Pima County Sanitary District

Total Active Members	36,548
Inactive—one year	1,166
Total Member Accounts	37,714
Retired Members	1,283
Total	38,997

/s/WAYNE R. GIBSON
Wayne R. Gibson
Director

ATTEST:
/s/CAROL L. DUFF
(SEAL)
My Commission Expires Aug. 22, 1965

C10

ATTORNEY GENERAL
STATE OF ARIZONA

November 10, 1965

Dear Mr. Haggerty:

As requested by your letter of October 21, I am enclosing membership statistics for members covered by the Arizona State Retirement System for the fiscal years ending June 30, 1962, through June 30, 1965. This information is presented in the same manner as it was in our previous letter of February 19, 1962. The employees withdrawing funds from the State Retirement System for the same fiscal years are as follows:

June 30, 1962.....5,327
June 30, 1963.....6,132
June 30, 1964.....7,722
June 30, 1965.....8,710

If we can be of any further help, please do not hesitate to contact our office.

Sincerely yours,

JOHN D. JACOBS

John D. Jacobs
Assistant Director

JDJ-vw
Enclosures

ARIZONA STATE RETIREMENT MEMBERSHIP

All State Employees - including the Universities and College	11,635
School Employees - all teachers in Arizona and the non-teaching employees of the following schools:	19,032

Apache County
- *McNary #23

Cochise County
- Benson Schools
- Bisbee Schools
- Douglas Schools
- *Tombstone Schools
- Willcox Schools

Coconino County
- Flagstaff Schools
- Grand Canyon Schools
- Main Consolidated Schools
- Page Schools
- Tuba City Schools
- Williams Schools

Gila County
- Globe Schools
- Miami Schools

Graham County
- Eastern Arizona Junior College

Greenlee County
- Clifton Schools
- Morenci Schools

Maricopa County
- Agua Fria Union H. S.
- Arlington #47
- Alhambra #68
- Avondale #44
- *Buckeye #33
- Buckeye Union H. S.
- Cartwright #83
- Chandler Schools
- Creighton #14
- Dysart Schools
- Fowler #45
- *Gilbert Schools
- Glendale #40
- Glendale Union H. S.
- Isaac #5
- Kyrene #28
- Liberty #25
- Litchfield #79
- *Littleton #65
- Madison #38
- *Mesa Schools
- Paradise Valley Schools
- *Peoria Schools
- Phoenix #1
- Phoenix Union H. S.
- Riverside #2
- Roosevelt #66
- Scottsdale Schools
- Sierra Vista #97
- Tempe #3
- Tempe Union H. S.
- Washington #6
- Wickenburg Schools

Mohave County
- Mohave County Union H. S.

Navajo County
- Winslow Schools

Pima County
- *Ajo Schools
- Amphitheater Schools
- *Catalina Foothills #16
- Flowing Wells Schools
- Marana Schools
- Sahuarita Schools
- San Fernando #35
- Sunnyside Schools
- Tanque Verde #13
- Tucson Schools

Pinal County
- Casa Grande #4
- Coolidge Schools
- Florence Union H. S.
- Kenilworth #28
- Mammoth-San Manuel Schools
- Stanfield Schools
- Teltec #22

Santa Cruz County
- Patagonia #6
- Patagonia Union H. S.

Yavapai County
- *Ashfork Schools
- Bagdad Schools
- *Chino Valley #51
- Mingus Union H. S.
- Prescott Schools
- *Seligman Schools
- Verde #3

Yuma County
- *N. Yuma County Union H. S.
- Parker #27
- Yuma #1
- Yuma Union H. S.

Political Subdivisions	7,135

County Employees
- Cochise
- Coconino
- Graham
- Greenlee
- Maricopa
- Mohave
- Navajo
- Pima
- Pinal
- Santa Cruz
- Yavapai
- Yuma

City and Town Employees
- Avondale
- Chandler
- Clifton
- Casa Grande
- Douglas
- Flagstaff
- Gilbert
- Glendale
- Goodyear
- Kingman
- Mesa
- Prescott
- Safford
- Scottsdale
- Tempe
- Tolleson
- Wickenburg
- Williams
- Yuma

- Flagstaff Housing Authority
- Flood Control District of Maricopa County
- Maricopa County Water Conservation District
- Pima County Sanitary District
- *Tucson Airport Authority
- Tucson Housing Authority

Total Active Members	37,802
Inactive - Leave of Absence	6,265
Total Member Accounts	44,067
Retired Members	1,547
Total	45,614

*System Membership established July 1, 1962

ARIZONA STATE RETIREMENT SYSTEM

State Employees, including the Universities and College				11,723
Junior Colleges - Cochise, Graham, Maricopa and Yuma				355
School Employees - all teachers in Arizona, and the non-teaching employees of the following schools:				21,211
Apache County				
McNary #23	*Round Valley H. S.	*St. Johns #1		
*McNary H. S.	*Sanders H. S.	*St. Johns H. S.		
Cochise County				
Benson	Douglas	Tombstone	Willcox	
Bisbee	*Elfrida #12	Valley U. H. S.		
Coconino County				
Flagstaff	Main Consolidated	Tuba City		
Grand Canyon	Page	Williams		
Gila County				
Globe	Miami	*Payson	*Rice #20	
Greenlee County				
Clifton	Morenci			
Maricopa County				
Agua Fria U. H. S.	Creighton #14	Litchfield #79	Riverside #2	
Arlington #47	Dysart	Littleton #65	Roosevelt #66	
Alhambra #68	Fowler #45	Madison #38	Scottsdale	
Avondale #44	Gilbert	Mesa	Sierra Vista #97	
*Balsz #31	Glendale #40	*Osborn #8	Tempe #3	
Buckeye #33	Glendale U. H. S.	Paradise Valley	Tempe U. H. S.	
Buckeye U. H. S.	Isaac #5	Peoria	Washington #6	
Cartwright #83	Kyrene #28	Phoenix #1	Wickenburg	
Chandler	Liberty #25	Phoenix U. H. S.	*Wilson #7	
Mohave County				
*Kingman #4	Mohave County U. H. S.			
Navajo County				
*Kayenta #27	Winslow			
Pima County				
Ajo	Flowing Wells	San Fernando #35	Tanque Verde #13	
Amphitheater	Marana	Sunnyside	Tucson	
Catalina Foothills	Sahuarita			
Pinal County				
Casa Grande #4	Florance U. H. S.	Mammoth-San Manuel	Toltec #22	
Coolidge	Kenilworth #28	Stanfield		
Santa Cruz County				
Patagonia #6	Patagonia U. H. S.			
Yavapai County				
Ashfork	Chino Valley #51	Prescott	Verde #3	
Bagdad	Mingus U. H. S.	Seligman		
Yuma County				
N. Yuma Cty. U. H. S.	Parker #27	Somerton	Yuma #1	
Yuma U. H. S.				
Political Subdivisions				6,722
County Employees				
Cochise	Greenlee	Navajo	Santa Cruz	
Coconino	Maricopa	Pima	Yavapai	
Graham	Mohave	Pinal	Yuma	
Municipal Employees				
Avondale	Flagstaff	Mesa	Tolleson	
Chandler	Gilbert	Prescott	Wickenburg	
Clifton	Glendale	Safford	Williams	
Casa Grande	Goodyear	Scottsdale	Yuma	
Douglas	Kingman	Tempe		
Flagstaff Housing Authority		Pima County Sanitary District		
Flood Control District of Maricopa County		Tucson Airport Authority		
Maricopa County Water Conservation Dist.		Tucson Housing Authority		
Total Active Members				40,011
Inactive - Leave of Absence				4,870
Total Member Accounts				44,881
Retired Members				1,797
Total				46,678

*System Membership established July 1, 1963

ARIZONA STATE RETIREMENT SYSTEM MEMBERSHIP

All State Employees, including the Universities and College — 12,404

All Public School Teachers, all Junior College personnel, and non-teaching employees in the following schools: — 24,583

*Chinle	Morenci	*Murphy #21	San Fernando #35
McNary	Agua Fria U.H.S.	Osborn #8	Sunnyside
Round Valley H.S.	Arlington #47	Paradise Valley	Tanque Verde #13
Sanders H.S.	Alhambra #68	Peoria	Tucson
St. Johns	Avondale #44	Phoenix #1	Casa Grande #4
*Window Rock	Balsz #31	Phoenix U.H.S.	Coolidge
Benson	Buckeye #33	Riverside #2	Florence U.H.S.
Bisbee	Buckeye U.H.S.	Roosevelt #66	Kenilworth #28
Buena	Cartwright #83	Scottsdale	Mammoth-San Manuel
Douglas	Chandler	Sierra Vista #97	Stanfield
Elfrida #12	Creighton #14	Tempe #3	Toltec #22
*Pomerene #64	Dysart	Tempe U.H.S.	Patagonia #6
Tombstone	Fowler #45	Washington #6	Patagonia U.H.S.
Valley U.H.S.	*Gila Bend	Wickenburg	Ashfork
Willcox	Gilbert	Wilson #7	Bagdad
Flagstaff	Glendale #40	Kingman #4	Chino Valley #51
Grand Canyon	Glendale U.H.S.	Mohave County U.H.S.	Mingus U.H.S.
Main Consolidated	*Higley #60	Kayenta #27	Prescott
Page	Isaac #5	*Keams Canyon	Seligman
Tuba City	Kyrene #28	Winslow	Verde #3
Williams	*Laveen #59	Ajo	*Crane #13
Globe	Liberty #25	Amphitheater	N. Yuma City U.H.S.
Miami	Litchfield #79	Catalina Foothills	Yuma U.H.S.
Payson	Littleton #65	Flowing Wells	Parker #27
Rice #20	Madison #38	Marana	Somerton
*Bonita	Mesa	Sahuarita	Yuma #1
Clifton			

Employees of the following Political Subdivisions: — 7,559

Counties

Cochise	Greenlee	Navajo	Santa Cruz
Coconino	Maricopa	Pima	Yavapai
Graham	Mohave	Pinal	Yuma

Municipalities

Avondale	Flagstaff	Mesa	Tempe
*Bisbee	Gilbert	Prescott	Tolleson
Chandler	Glendale	Safford	Wickenburg
Clifton	Goodyear	Scottsdale	Williams
Casa Grande	*Hayden	*Sierra Vista	Yuma
Douglas	Kingman		

Flagstaff Housing Authority
Flood Control District of Maricopa County
*Glendale Housing Authority
Maricopa County Water Conservation District
Pima County Sanitary District
Tucson Airport Authority
Tucson Housing Authority

Total Active Members	44,546
Inactive – Leave of Absence	7,568
Total Member Accounts	52,114
Retired Members	2,095
Total	54,209

*System Membership established July 1, 1964

ARIZONA STATE RETIREMENT SYSTEM MEMBERSHIP

All State Employees, including the Universities and Colleges 14,704

All Public School Teachers, all Junior College personnel, and non-teaching employees in the following schools: 26,242

Agua Fria U.H.S.
*Aguila
Ajo
Alhambra
Amphitheater
*Apache Jct.
Arlington
Ashfork
Avondale
Bagdad
Balsz
Benson
Bisbee
Bonita
Buckeye Elem.
Buckeye U.H.S.
Buena
Cartwright
Casa Grande Elem.
Catalina Foothills
*Cave Creek
Chandler
Chinle
Chino Valley
Clifton
Coolidge
Crane
Creighton
Douglas
Dysart
Elfrida
Flagstaff
Florence U.H.S.
Flowing Wells
Fowler
*Gadsden
*Ganado
Gila Bend
Gilbert
Glendale Elem.
Glendale U.H.S.
Globe
Grand Canyon
Higley
*Holbrook
*Humboldt
Isaac
Kayenta
Keams Canyon
Kenilworth
Kingman Elem.
Kyrene
Laveen
Liberty
Litchfield
Littleton
Madison
Maine
Mammoth
Marana
McNary
Mesa
Miami
Mingus U.H.S.
Mohave Co. U.H.S.
Morenci
Murphy
N. Yuma Co. U.H.S.
Osborn
Page
Paradise Valley
Parker Elem.
Patagonia Elem.
Patagonia U.H.S.
Payson
Peoria
Phoenix Elem.
Phoenix U.H.S.
*Picacho
Pomerene
Prescott
Rice
Riverside
Roosevelt
Round Valley H.S.
*Safford
Sahuarita
San Fernando
San Manuel
Sanders H.S.
*Santa Cruz V.U.H.S.
Scottsdale
Seligman
Sierra Vista
Somerton
St. Johns
Stanfield
Sunnyside
Tanque Verde
Tempe Elem.
Tempe U.H.S.
*Theba
*Tolleson Elem.
*Tolleson U.H.S.
Toltec
Tombstone
Tuba City
Tucson
Valley U.H.S.
Verde
Washington
*Wellton
*Whiteriver
Wickenburg
Willcox
Williams
Wilson
Window Rock
Winslow
Yuma Elem.
Yuma U.H.S.

Employees of the following Political Subdivisions 7,802

Counties:
*Apache
Cochise
Coconino
Graham
Greenlee
Maricopa
Mohave
Navajo
Pima
Pinal
Santa Cruz
Yavapai
Yuma

Municipalities:
Avondale
Bisbee
Chandler
Clifton
Casa Grande
Douglas
Flagstaff
Gilbert
Glendale
Goodyear
Hayden
*Holbrook
Kingman
Mesa
*Parker
Prescott
Safford
Scottsdale
Sierra Vista
Tempe
Tolleson
Wickenburg
*Willcox
Williams
*Winslow
Yuma

Flagstaff Housing Authority
Flood Control District of Maricopa County
Glendale Housing Authority
Maricopa County Water Conservation District
Pima County Sanitary District
Tucson Airport Authority
Tucson Housing Authority
Winslow Housing Authority

Total Active Members	48,748
Inactive—Leave of Absence	5,889
TOTAL MEMBER ACCOUNTS	54,637
Retired Members	2,435
TOTALS	57,072

*System Membership established July 1, 1965

SUPREME COURT OF THE UNITED STATES

No. 656.—October Term, 1965.

Barbara Elfbrandt, Petitioner, v. Imogene R. Russell et al. | On Writ of Certiorari to the Supreme Court of the State of Arizona.

[April 18, 1966.]

Mr. Justice Douglas delivered the opinion of the Court.

This case, which involves questions concerning the constitutionality of an Arizona Act requiring an oath from state employees, has been here before. We vacated the judgment of the Arizona Supreme Court which had sustained the oath (94 Ariz. 1, 381 P. 2d 554) and remanded the cause for reconsideration in light of *Baggett* v. *Bullitt*, 377 U. S. 360. See 378 U. S. 127. On reconsideration the Supreme Court of Arizona reinstated the original judgment. 97 Ariz. 140, 397 P. 2d 944. The case is here on certiorari. 382 U. S. 810.

The oath reads in conventional fashion as follows: [1]

> "I, (type or print name) do solemnly swear (or affirm) that I will support the Constitution of the United States and the Constitution and laws of the State of Arizona; that I will bear true faith and allegiance to the same, and defend them against all enemies, foreign and domestic, and that I will faithfully and impartially discharge the duties of the office of (name of office) according to the best of my ability, so help me God (or so I do affirm)."

The Legislature put a gloss on the oath [2] by subjecting to a prosecution for perjury and for discharge from public

[1] Ariz. Rev. Stat. § 38-231 (1965 Supp.).

[2] *Id.*, § E reads as follows:

"Any officer or employee as defined in this section having taken the form of oath or affirmation prescribed by this section, and know-

office anyone who took the oath and who "knowingly and wilfully becomes or remains a member of the communist party of the United States or its successors or any of its subordinate organizations" or "any other organization" having for "one of its purposes" the overthrow of the government of Arizona or any of its political subdivisions where the employee had knowledge of the unlawful purpose. Petitioner, a teacher and a Quaker, decided she could not in good conscience take the oath, not knowing what it meant and not having any chance to get a hearing at which its precise scope and meaning could be determined. This suit for declaratory relief followed. On our remand the Arizona Supreme Court said that the gloss on the oath is "not afflicted" with the many uncertainties found potentially punishable in *Baggett* v. *Bullitt*, *supra*.

"Nor does it reach endorsements or support for Communist candidates for office nor a lawyer who

---

ingly or wilfully at the time of subscribing the oath or affirmation, or at any time thereafter during his term of office or employment, does commit or aid in the commission of any act to overthrow by force or violence the government of this state or of any of its political subdivisions, or advocates the overthrow by force or violence of the government of this state or of any of its political subdivisions, or during such term of office or employment knowingly and wilfully becomes or remains a member of the communist party of the United States or its successors or any of its subordinate organizations or any other organization having for one of its purposes the overthrow by force or violence of the government of the state of Arizona or any of its political subdivisions, and said officer or employee as defined in this section prior to becoming or remaining a member of such organization or organizations had knowledge of said unlawful purpose of said organization or organizations, shall be guilty of a felony and upon conviction thereof shall be subject to all the penalties for perjury; in addition, upon conviction under this section, the officer or employee shall be deemed discharged from said office or employment and shall not be entitled to any additional compensation or any other emoluments or benefits which may have been incident or appurtenant to said office or employment."

represents the Communist Party, or its members, nor journalists who defend the Communist Party, its rights, or its members. Such conduct is neither an act nor in aid of an act attempting to overthrow the government by force and violence.

"It is our conclusion that the portions of the Arizona act here considered do not forbid or require conduct in terms so vague that men of common intelligence must necessarily guess at the meaning and differ as to their application." 397 P. 2d, at 948.

Mr. Justice Bernstein in dissent responded that the majority had failed to consider the so-called "membership clause" of the oath and accompanying statutory gloss:

"Let us consider a scientist, a teacher in one of our universities. He could not know whether membership is prohibited in an international scientific organization which includes members from neutralist nations and Communist bloc nations—the latter admittedly dedicated to the overthrow of our government and which control the organization—even though access to the scientific information of the organization is available only to its members.

. . . . .

"Though all might agree that the principal purpose of such an organization is scientific, the statute makes his membership a crime if any subordinate purpose is the overthrow of the state government. The vice of vagueness here is that the scientist cannot know whether membership in the organization will result in prosecution for a violation of § 38–231, subd. E or in honors from his university for the encyclopedic knowledge acquired in his field in part through his membership." *Id.*, at 949.

We recognized in *Scales* v. *United States*, 367 U. S. 203, 229, that "quasi-political parties or other groups . . .

may embrace both legal and illegal aims." We noted that a "blanket prohibition of association with a group having both legal and illegal aims" would pose "a real danger that legitimate political expression or association would be impaired." The statute with which we dealt in *Scales*, the so-called "membership clause" of the Smith Act (18 U. S. C. § 2385), was found not to suffer from this constitutional infirmity because as the Court construed it, the statute reached only "active" membership (*id.*, at 222) with the "specific intent" of assisting in achieving the unlawful ends of the organization (*id.*, at 229–230). The importance of this limiting construction from a constitutional standpoint was emphasized in *Noto* v. *United States*, 367 U. S. 290, 299–300, decided the same day:

> "[I]t should also be said that this element of the membership crime [the defendant's 'personal criminal purpose to bring about the overthrow of the Government by force and violence' "], like its others, must be judged *strictissimi juris*, for otherwise there is a danger that one in sympathy with the legitimate aims of such an organization, but not specifically intending to accomplish them by resort to violence, might be punished for his adherence to lawful and constitutionally protected purposes, because of other and unprotected purposes which he does not necessarily share." [3]

Any lingering doubt that proscription of mere knowing membership, without any showing of "specific intent," would run afoul of the Constitution was set at rest by our decision in *Aptheker* v. *Secretary of State*, 378 U. S. 500. We dealt there with a statute which provided that no member of a Communist organization ordered by the

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[3] Cf. *Rowoldt* v. *Perfetto*, 355 U. S. 115, 120; *Gastelum-Quinones* v. *Kennedy*, 374 U. S. 469.

Subversive Activities Control Board to register shall apply for or use a passport. We concluded that the statute would not permit a narrow reading of the sort we gave § 2385 in *Scales*. See 378 U. S., at 511, n. 9. The statute, as we read it, covered membership which was not accompanied by a specific intent to further the unlawful aims of the organization, and we held it unconstitutional.

The oath and accompanying statutory gloss challenged here suffer from an identical constitutional infirmity. One who subscribes to this Arizona oath and who is, or thereafter becomes, a knowing member of an organization which has as "one of its purposes" the violent overthrow of the government, is subject to immediate discharge and criminal penalties. Nothing in the oath, the statutory gloss, or the construction of the oath and statutes given by the Arizona Supreme Court, purports to exclude association by one who does not subscribe to the organization's unlawful ends. Here as in *Baggett* v. *Bullitt*, *supra*, the "hazard of being prosecuted for knowing but guiltless behavior" (*id.*, at 373) is a reality. People often label as "communist" ideas which they oppose; and they make up our juries. "[P]rosecutors too are human." *Cramp* v. *Board of Public Instruction*, 368 U. S. 278, 287. Would a teacher be safe and secure in going to a Pugwash Conference?[4] Would it be legal to join a seminar group predominantly Communist and

[4] The Pugwash Conferences, A Staff Analysis, Subcommittee to Investigate the Administration of the Internal Security Act, Senate Committee on the Judiciary, 87th Cong., 1st Sess. (1961); Rabinowitch, Pugwash—History and Outlook, 13 Bull. Atomic Sci. 243 (1957); Topchiev, Comments on Pugwash: From the East, 14 Bull. Atomic Sci. 118 (1958); Thirring, Comments on Pugwash: From the West, *id.*, at 121; Rabinowitch, The Stowe Conferences, 17 Bull. Atomic Sci. 382 (1961); Statement of International Pugwash Continuing Committee: Pugwash XIII, Bull. Atomic Sci. 43–45 (December 1964); Documents of Second Pugwash Conference of Nuclear Scientists (March 31–April 11, 1958).

therefore subject to control by those who are said to believe in the overthrow of the government by force and violence? Juries might convict though the teacher did not subscribe to the wrongful aims of the organization. And there is apparently no machinery provided for getting clearance in advance.[5]

Those who join an organization but do not share its unlawful purposes and who do not participate in its unlawful activities surely pose no threat, either as citizens or as public employees. Laws such as this which are not restricted in scope to those who join with the "specific intent" to further illegal action impose, in effect, a conclusive presumption that the member shares the unlawful aims of the organization. See *Aptheker* v. *Secretary of State, supra,* at 511. The unconstitutionality of this Act follows *a fortiori* from *Speiser* v. *Randall,* 357 U. S. 513, where we held that a State may not even place on an applicant for a tax exemption the burden of proving that he has not engaged in criminal advocacy.

This Act threatens the cherished freedom of association protected by the First Amendment, made applicable to the States through the Fourteenth Amendment. *Baggett* v. *Bullitt, supra; Cramp* v. *Board of Public Instruction, supra.* Cf. *NAACP* v. *Alabama,* 357 U. S. 449, 460 *et seq.; Gibson* v. *Florida Legislative Committee,* 372 U. S. 539, 543–546. And as a committee of the Arizona Legislature which urged adoption of this law itself recognized, public employees of character and integrity may

[5] Petitioner would, of course, have a hearing at a perjury trial, after the event. And one member of the Arizona Supreme Court felt that petitioner, having tenure, would be entitled to a hearing before she was discharged from her teaching position. See *Elfbrandt* v. *Russell,* 381 P. 2d 554, 565 (Bernstein, C. J., concurring). But even that is not authoritatively decided by the Court; indeed, another opinion states this to be a minority view, 381 P. 2d, at 566 (separate opinion of Jennings, J.).

well forgo their calling rather than risk prosecution for perjury or compromise their commitment to intellectual and political freedom:

> "The communist trained in fraud and perjury has no qualms in taking any oath; the loyal citizen, conscious of history's oppressions may well wonder whether the medieval rack and torture wheel are next for the one who declines to take an involved negative oath as evidence that he is a True Believer." [6]

A statute touching those protected rights must be "narrowly drawn to define and punish specific conduct as constituting a clear and present danger to a substantial interest of the state." *Cantwell* v. *Connecticut,* 310 U. S. 296, 311. Legitimate legislative goals "cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved." *Shelton* v. *Tucker,* 364 U. S. 479, 488. And see *Louisiana* v. *NAACP,* 366 U. S. 293, 296–297. As we said in *NAACP* v. *Button,* 371 U. S. 415, 432–433:

> "The objectionable quality of . . . overbreadth does not depend upon absence of fair notice to a criminally accused or upon unchanneled delegation of legislative powers, but upon the danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping and improper application. . . . These freedoms are delicate and vulnerable, as well as supremely precious in our society. The threat of sanctions may deter their exercise almost as potently as the actual application of sanctions. . . ."

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[6] Report of the Judiciary Committee in Support of the Committee Amendment to H. B. 115, Journal of the Senate, 1st Reg. Sess., 25th Legislature of the State of Arizona, p. 424 (1961).

A law which applies to membership without the "specific intent" to further the illegal aims of the organization infringes unnecessarily on protected freedoms. It rests on the doctrine of "guilt by association" which has no place here. See *Schneiderman* v. *United States*, 320 U. S. 118, 136; *Schware* v. *Board of Bar Examiners*, 353 U. S. 232, 246. Such a law cannot stand.

Reversed.

SUPREME COURT OF THE UNITED STATES

No. 656.—October Term, 1965.

Barbara Elfbrandt, Petitioner, *v.* Imogene R. Russell et al. | On Writ of Certiorari to the Supreme Court of the State of Arizona.

[April 18, 1966.]

Mr. Justice White, with whom Mr. Justice Clark, Mr. Justice Harlan and Mr. Justice Stewart concur, dissenting.

According to unequivocal prior holdings of this Court, a state is entitled to condition public employment upon its employees abstaining from knowing membership in the Communist Party and other organizations advocating the violent overthrow of the government which employs them; the state is constitutionally authorized to inquire into such affiliations and it may discharge those who refuse to affirm or deny them. *Gerende* v. *Board of Supervisors of Elections*, 341 U. S. 56; *Garner* v. *Board of Public Works*, 341 U. S. 716; *Adler* v. *Board of Education*, 342 U. S. 485; *Beilan* v. *Board of Education*, 357 U. S. 399; *Lerner* v. *Casey*, 357 U. S. 468; *Nelson* v. *County of Los Angeles*, 362 U. S. 1; see also *Wieman* v. *Updegraff*, 344 U. S. 183; *Slochower* v. *Board of Education*, 350 U. S. 551. The Court does not mention or purport to overrule these cases; nor does it expressly hold that a state must retain, even in its most sensitive positions, those who lend such support as knowing membership entails to those organizations, such as the Communist Party, whose purposes include the violent destruction of democratic government.

Under existing constitutional law, then, Arizona is free to require its teachers to refrain from knowing membership in the designated organizations and to bar from em-

ployment all knowing members as well as those who refuse to establish their qualifications to teach by executing the oath prescribed by the statute. Arizona need not retain those employees on the governor's staff, in the Phoenix police department or in its schools who insist on holding membership in and lending their name and influence to those organizations aiming at violent overthrow. *Adler* v. *Board of Education*, 342 U. S. 485.

It would seem, therefore, that the Court's judgment is aimed at the criminal provisions of the Arizona law which expose an employee to a perjury prosecution if he swears falsely about membership when he signs the oath or if he later becomes a knowing member while remaining in public employment. But the State is entitled to condition employment on the absence of knowing membership; and if an employee obtains employment by falsifying his present qualifications, there is no sound constitutional reason for denying the State the power to treat such false swearing as perjury. *Alire* v. *United States*, 313 F. 2d 31; *Ogden* v. *United States*, 303 F. 2d 724.[1] By the same token, since knowing membership in specified organizations is a valid disqualification, Arizona cannot sensibly be forbidden to make it a crime for a person, while a state employee, to join an organization knowing of its dedication to the forceful overthrow of his employer and knowing that membership disqualifies him for state employment. The crime provided by the Arizona law is not just the act of becoming a member of an organization but it is that membership plus concurrent public employment. If a State may dis-

[1] These cases uphold the constitutionality of 18 U. S. C. § 1001 (1964), which makes it a crime to make false statements with regard to any matter within the jurisdiction of any department or agency of the United States. Many States have comparable statutes, *e. g.*, Cal. Govt. Code §§ 1368, 3108; Mass. Laws Ann., c. 264, §§ 14, 15; Okla. Stat. Ann., Tit. 51, §§ 36.5, 36.6.

qualify for knowing membership and impose criminal penalties for falsifying employment applications, it is likewise within its powers to move criminally against the employee who knowingly engages in disqualifying acts during his employment. If a government may remove from office, 5 U. S. C. § 118 (i) (1964 ed.), *United Public Workers of America* v. *Mitchell*, 330 U. S. 75, and criminally punish, 18 U. S. C. § 607 (1964 ed.), its employees who engage in certain political activities, it is unsound to hold that it may not, on pain of criminal penalties, prevent its employees from affiliating with the Communist Party or other organizations prepared to employ violent means to overthrow constitutional government. Our Constitution does not require this kind of protection for the secret proselyting of government employees into the Communist Party, an organization which has been found to be controlled by a foreign power and to be dedicated to the overthrow of the government by any illegal means necessary to achieve this end. *Communist Party of the United States* v. *Subversive Activities Control Board*, 367 U. S. 1.[2]

There is nothing in *Scales* v. *United States*, 367 U. S. 203, *Noto* v. *United States*, 367 U. S. 290, or *Aptheker* v. *Secretary of State*, 378 U. S. 500, dictating the result reached by the Court. *Scales* involved the construction of the Smith Act and a holding that the membership clause did not reach members who knew of the illegal aims of the Party but lacked an active membership and an intent to further the illegal ends. *Noto* also involved a construction of the Smith Act, the conviction there being reversed for insufficient evidence. *Aptheker* struck down a provision denying passports to members of the

[2] See the findings of Congress, Subversive Activities Control Act of 1950, 50 U. S. C. § 581 (1954 ed.), and of the Arizona Legislature, Arizona Communist Control Act of 1961, Ariz. Laws 1961, c. 108, § 2.

Communist Party which applied "whether or not one knows or believes that he is associated with an organization operating to further aims of the world Communist movement . . . . The provision therefore sweeps within its prohibition both knowing and unknowing members." 378 U. S., at 510. In any event, *Scales*, *Noto* and *Aptheker* did not deal with the government employee who is a knowing member of the Communist Party. They did not suggest that the state or federal government should be prohibited from taking elementary precautions against its employees forming knowing and deliberate affiliations with those organizations who conspire to destroy the government by violent means. *Speiser* v. *Randall*, 357 U. S. 513, also relied upon by the majority, carefully preserved *Gerende* and *Garner* for reasons which I think are equally applicable to the Arizona oath and statute. In my view, therefore, the Court errs in holding that the act is overbroad because it includes state employees who are knowing members but who may not be active and who may lack the specific intent to further the illegal aims of the Party.[3]

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[3] On remand from this Court, 378 U. S. 127, the Arizona Supreme Court gave the oath and statute a narrow reading that eliminated their vulnerability to the charge of being unconstitutionally vague. 97 Ariz. 140, 397 P. 2d 944. See *Baggett* v. *Bullitt*, 377 U. S. 360. Although the majority on remand did not dwell on the membership clause, this, it seems to me, is because its meaning is clear from the face of the statute. By its own terms, unless the organization joined actually has as a purpose unlawful revolution and the employee actually knows of this purpose, he commits no crime. "And since the constitutional vice in a vague or indefinite statute is the injustice to the accused in placing him on trial for an offense, the nature of which he is given no fair warning, the fact that punishment is restricted to acts done with knowledge that they contravene the statute makes this objection untenable." *American Communications Assn.* v. *Douds*, 339 U. S. 382, 413.

Even if Arizona may not take criminal action against its law enforcement officers or its teachers who become Communists knowing of the purposes of the Party, the Court's judgment overreaches itself in invalidating this Arizona statute. Whether or not Arizona may make knowing membership a crime, it need not retain the member as an employee and is entitled to insist that its employees disclaim, under oath, knowing membership in the designated organizations and to condition future employment upon future abstention from membership. It is, therefore, improper to invalidate the entire statute in this declaratory judgment action. If the imposition of criminal penalties under the present act is invalid, the Court should so limit its holding and remand the case to the Arizona courts to determine the severability of the criminal provisions under the severability provisions of the act itself. Arizona Communist Control Act of 1961, Ariz. Laws 1961, c. 108, § 8.